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# ITA IN REVIEW

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# ITA IN REVIEW

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# 33RD ANNUAL ITA WORKSHOP AND ANNUAL MEETING
# ARBITRATOR ETHICS IN INTERNATIONAL ARBITRATION: A DEVELOPING STORY OF CHALLENGES, CODES, CONFLICTS, AND DISCLOSURES

A Virtual Conference
June 16 to June 18, 2021

## I. INTRODUCTION

The ITA Workshop, held in Dallas on the third Thursday in June every year since 1989, is widely recognized as the leading conference in the field in the United States. As one participant summarized succinctly: "It is the forum in which legitimate top practitioners gather annually. Thus, the topics are sophisticated, the networking is legitimate, and the social element is valuable." The Workshop now begins on the preceding Wednesday afternoon, with membership meetings and activities continuing into the following Friday.

At the conclusion of the Workshop on Thursday evening, members of the ITA Advisory Board, the Workshop faculty and their guests mix a bit of business with pleasure at the Advisory Board Annual Dinner. On Friday morning, members of the Advisory Board, Academic Council, ITAAR Board of Reporters, ITAFOR Moderators and Contributors, and the Workshop faculty reassemble for the annual open discussion ITA Forum and other membership activities.

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The keynote address on Arbitrator Ethics in International Arbitration by **Constantine Partasides** (London).

An ensuing panel on emerging codes of conduct for arbitrators in ISDS with **Prof. Catherine Rogers** (Milan), **Laurent Lévy** (Geneva) and **Karim Youssef** (Cairo).

An expert panel on arbitrator conflicts and disclosures with **Julie Bédard** (New York and Sao Paolo), **Mia Essien** (Lagos), **Lord Mance** (London) and **Vladimir Khvalei** (Moscow).

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The best way to attend the Workshop is as an ITA member. For free, ITA members may also attend (and will receive separate invitations to) a variety of additional online events and meetings interspersed with the Workshop events during Wednesday-Friday, June 16-18, including:

The **Advisory Board Annual Meeting and Reception**;

Annual Meetings of the **Americas Initiative** and **Young ITA**, editorial boards, and the Academic Council, and

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# THE PRINCIPLE OF CLEAN HANDS IN INTERNATIONAL INVESTMENT ARBITRATION:
# WHAT IS THE EXTENT OF INVESTMENT PROTECTION IN INVESTOR-STATE DISPUTES?

*by* Agata Zwolankiewicz

## V. INTRODUCTION

In the last decade, the investor-state dispute settlement system has been subject to criticism. It is mainly due to the fact that the standard of protection under investment treaties significantly tips the scales in investors' favor. Such a tilted protection mechanism has been referred to as "asymmetric treaties." It creates an unbalanced investment law regime under which two-thirds of the cases are settled or lost by states.[1] However, despite the vast protection of investors, it is not unlimited. One of the bars to having a dispute resolved by arbitral tribunal in investor-state arbitration proceedings is the illegality of the investment. It is understood as the non-conformity of the investment with the laws and regulations of the host state. There is a prevailing view that the illegality of the investment would deprive the investor of a treaty protection to a certain extent.[2] The illegality can influence the jurisdiction of the tribunal and the admissibility of the claim, as well as have negative consequences with regard to the merits of the case, such as resulting in a reduced compensation.[3] The more contentious issue, which is a subject of this article, present in both legal writing as well as case law refers to the presence of the so-called principle of clean hands in the international investment law regime.

[1] Frank J Garcia, *The Case Against Third-Party Funding in Investment Arbitration*, INV. TREATY NEWS, July 20, 2018, https://iisd.org/itn/2018/07/30/the-case-against-third-party-funding-in-investment-arbitration-frank-garcia/.

[2] See e.g. Zachary Douglas, The Plea of Illegality in Investment Treaty Arbitration, 29 ICSID REVIEW 155, 155 (2014); Jarrod Hepburn, In Accordance with Which Host State Laws? Restoring the Defence of Investor Illegality in Investment Arbitration, 5 J. INT'L DISP. SETTLEMENT 531, 532 (2014); Sam Luttrell, Fall of the Phoenix: A New Approach to Illegality Objections in Investment Treaty Arbitration, 44 U. OF W. AUSTL. L. REV. 120, 127 (2019).

[3] Douglas, *supra* note 2, at 155.

As explained further, the clean hands principle concerns one of the prerequisites the party seeking relief has to comply with. Therefore, if a party has "unclean hands," i.e. if the party has engaged in a certain type of a wrongdoing (including but not limited to fraud, misrepresentation, violation of state's laws and regulations) related to its own claim, the clean hands doctrine will prevent that party from benefiting from its own unlawful behavior.

International investment law lacks consensus as to whether the illegality of the investment and "unclean hands" relate to separate notions and whether there is any overlap between them.[1] The lack of uniformity in the approach of legal scholars and arbitral tribunals makes it even more difficult to define the notion and scope of the clean hands principle. It also hinders the process of establishing a recognized principle of international law on which the investment tribunals should rely when deciding a dispute between an investor and a host state.

This article constitutes an attempt to gather the existing relevant concepts and approaches to the principle of clean hands presented in the awards rendered by arbitral tribunals in investment disputes. It is necessary to provide the potential grounds for application of this principle by arbitral tribunals and indicate the possible scenarios in which such a defense can be raised. The inconsistency in legal writing and case law raises a question whether the status of the clean hands principle should be regulated in a more explicit manner. Given that there is no consensus whether it constitutes a general principle of international law or whether its application can be derived from the legality requirement included in the treaties, more clarity is desired in its application by tribunals. That is especially relevant insofar as the unclean hands of an investor can potentially lead to different results—the investment can be deprived of protection under the treaty due to the lack of jurisdiction or inadmissibility of the claim, or such a behavior can be of importance with relation to the merits of the case. The current lack of consistency in arbitral awards contributes to prevailing confusion among both investors and states. A certain degree of clarity

[1] Marcin Kałduński, Principle of Clean Hands and Protection of Human Rights in International Investment Arbitration, 4 POLISH REV. OF INT'L & EUR. L. 69, 69-74 (2015).

could be achieved through explicit differentiation in definitions included in BITs; however, such would only resolve the issue with regard to the treaties concluded in the future. Adopting a unanimous approach to clean hands principle is especially desired as the legitimacy of investor-state dispute settlement has been called into question. One of the allegations as to the malfunctioning of the system is the lack of consideration of human rights infringements in the investor-state arbitration. As it is the state's obligation to uphold rights contained in international human rights instruments, it is a very difficult task to hold an investor responsible for such actions. However, given that some international corporations have economic power and influence that is far greater than some small countries, it has been advocated that violations of internationally recognized human rights should be acknowledged in the arbitral proceedings. Even though the international human rights instruments do not impose obligations directly upon investors, application of the clean hands principle would prevent the investors from getting off scot-free.

## VI. THE CONCEPT OF THE CLEAN HANDS DOCTRINE

### A. *Introductory Remarks.*

The clean hands principle relates to the requirement of proper conduct by the party seeking relief. It consists in the notion that "if some form of illegal or improper conduct is found on the part of the investor, his or her hands will be "unclean," his claims will be barred and any loss suffered will lie where it falls."[2] Therefore, the aim of such a defense is to safeguard a party from the potential legal injury resulting from the other party benefiting from its own illegal or improper conduct.[3] In the application of that doctrine, tribunals have been resorting to the use of Latin maxims such as *ex delicto non oritur* action ("an action does not arise from fraud") and *ex turpi causa non oritur* ("from a dishonorable cause an action does not arise").[4] Taking all

[2] Aloysius Llamzon, Yukos Universal Limited (Isle of Man) v. The Russian Federation: The State of the "Unclean Hands Doctrine in International Investment Law: Yukos as Both Omega and Alpha, 30 ICSID REV. 315, 316 (2015).

[3] Kałduński, *supra* note 4, at 69.

[4] Patrick Dumberry, State of Confusion: The Doctrine of 'Clean Hands' in Investment Arbitration After the Yukos Award, 17 J. OF WORLD INV. & TRADE 229, 230 (2016).

the factors into consideration, it has been pointed out in legal writing that the doctrine of clean hands in the international investment law context can also be regarded as an emanation of the principle of good faith.[5]

The principle of clean hands has its roots in Roman traditions. It has been derived from several rules existing at that time: *ex turpi causa non oritur action* ("an action does not arise from a dishonorable cause"); *nemo auditur propriam turpitudinem allegans* ("no one can be heard to invoke his own turpitude"); and *nemo ex suo delicto meliorem suam conditionem est facit* ("no one can perfect his condition by a crime").[6] Therefore, due to its Roman roots, the doctrine has been widely adopted in civil-law jurisdictions. Nonetheless, common law tradition has also upheld the principle, deriving it from a positive defense based on equity.[7]

With time, the principle gained additional recognition in the field of international law. It was relied upon in the case between *Netherlands v. Belgium* concerning the diversion of water. The dispute was commenced by Belgium's actions undertaken to create Albert Canal. Belgium in its defense was alleging that it was in fact the Netherlands that first breached the existing 1863 treaty between the parties concerning the regime of diversions of water of the River Meuse by constructing and completing an additional canal, a lock and barrage at Borgharen. The court addressed the clean hands issue by referring to the notion of equity:

> It would seem to be an important principle of equity that where two parties have assumed an identical or a reciprocal obligation, one party which is engaged in a continuing non-performance of that obligation should not be permitted to take advantage of a similar non-performance of that obligation by the other party. The principle finds expression in the so-called maxims of equity which exercised great influence in the creative period of the development of the Anglo-American law. Some of these maxims are, "[e]quality is equity;" "[h]e who

[5] Marcin Kałduński, *The Element of Risk in International Investment Arbitration*,13 NON-STATE ACTORS & INT'L. L. 111, 122 (2011).

6 Mariano de Alba, Drawing the Line: Addressing Allegations of Unclean Hands in Investment Arbitration, 12 Brazilian J of Int'l. L. 322, 323 (2015).

7 Jamal Seifi & Kamal Javadi, The Consequences of the Clean Hands Concept in International Investment Arbitration, 19 Asian Y.B. of Int'l. L. 122, 126 (2013).

seeks equity must do equity."[8]

The court's reasoning was followed in the prominent dissenting opinion of Judge Stephen Schwebel adjudicating a case relating to the military and paramilitary activity in and against Nicaragua. Judge Schwebel perceived the clean hands principle as the fundamental principle of law: "[The Court] has also failed to draw the correct legal conclusions from those facts which it gives some sign of recognizing, as by failing to apply against Nicaragua that fundamental general principle of law so graphically phrased in the term, 'clean hands'" (emphasis added).[9] The International Court of Justice so far has not relied upon that principle; however, it has not questioned its existence as a binding principle of law either.[10] Thus, the lack of an affirmative endorsement of the principle by the International Court of Justice makes it more difficult for arbitral tribunals to apply the principle in investment cases. Despite the confusion, it constitutes a common defense raised by the parties in the proceedings.[11] Tribunals have approached the defense in various ways as to its existence, scope and definition.

One of the controversies surrounding the scope and concept of the clean hands doctrine concerns whether it relates to solely the initial stage of the investment–its making–or also the post-establishment performance. It has been found that the prevailing weight should be given to the wording of the treaty–whether it refers only to the establishment phase or subsequent actions of the investors.[12] However, the

[8] E.g. Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines, ICSID Case No. ARB/03/25.

[9] Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. Rep., 14, 285–86 (Schwebel, J., dissenting).

[10] Monika Diehl, *Legality of Investments and Investors' Actions in the Context of the Yukos Case*, 24 ARB. BULL. 122, 124 (2016).

[11] *E.g.* South American Silver, Ltd. v. Bolivia, Permanent Court of Arbitration, Award, ¶ 14 (Nov.22, 2018), *available at* https://www.italaw.com/sites/default/files/case-documents/italaw10361.pdf; Hesham Talaat M Al-Warraq v.Indonesia, (UNCITRAL) Final Award, ¶ 161–64 (Dec. 15, 2014), *available at* https://www.italaw.com/sites/default/files/case-documents/italaw4164.pdf.

[12] *E.g. Teinver* S.A., *Transportes de Cercanías* S.A. *and Autobuses Urbanos del Sur* S.A. *v. The Argentine Republic*, ICSID Case No. ARB/09/1.

case law is not consistent in this manner. The views on the doctrine depend on whether the issue refers to the illegality as such or unclean hands. In the first situation, it was noted that it is only necessary to examine whether the investment was made in conformity with the laws and regulations at the time of its establishment.[13] It has been argued with regard to the issue of the clean hands principle, especially in the context of violation of human rights, that the actions of the parties should also impact the protection under the treaty during the post-establishment phase of the investment[14] (see infra § II(C)).

B. *Grounds for Application.*

Arbitral tribunals have been approaching the doctrine of clean hands in a twofold manner—on the one hand applying the principle under the provisions of certain bilateral investment treaties (hereinafter BITs), and on the other, as a general principle of international law.[15]

With regard to BITs as grounds for application of the clean hands principle, some treaties require that any investment is made in compliance with the laws and regulations of the host state.[16] That has also been referred to in legal writing as the legality requirement.[17] Some scholars even point out that even if a treaty does not have an explicit reference to the investment being made in accordance with the laws and regulations of the host state, such can be interpreted from its preamble or

[13] E.g. Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines, ICSID Case No. ARB/03/25.

[14] Dumberry, *supra* note 7, at 230.

[15] de Alba, *supra* note 9, at 324.

[16] *E.g.* Art. 1 Bosnia and Herzegovina-Malaysia BIT (1994): "The term "investments" referred to in paragraph 1 (a) shall only refer to all investments that are made in accordance with the laws, regulations and national policies of the Contracting Parties."; Art. 1 Iran, Islamic Republic of-Japan BIT (2016) "the term "investment" refers to every kind of asset, invested directly or indirectly by an investor of a Contracting Party in the Territory of the other Contracting Party in accordance with the laws and regulations of the other Contracting Party"; Art. 8.1 Comprehensive Economic and Trade Agreement (CETA) "covered investment means, with respect to a Party, an investment made in accordance with the applicable law at the time the investment is made.

[17] Luttrell, *supra* note 2.

provisions governing the rights and obligations of the parties.[18] In *Phoenix Action, Ltd. v. The Czech Republic*,[19] the tribunal held that "the conformity of the establishment of the investment with the national laws—is implicit even when not expressly stated in the relevant BIT."[20] If tribunals find that an investor failed to comply with the BIT requirements, they would most typically deny the jurisdiction to hear the dispute under the reason that it would simply not qualify as an investment under the treaty regime.[21] Therefore, the investment in that case would be deprived of the substantive protection under BIT.

It seems that under the requirement of the investment being made in accordance with the laws and regulations of the host state, most cases concerned the issue of illegality as such. As pointed out in legal writing, "in accordance with the law" constitutes a manifestation of the principle of clean hands.[22] In the view of Patrick Dumberry, "when these tribunals are deciding whether or not an investment is protected under a BIT containing a legality requirement clause, they are in fact applying the clean hands doctrine."[23] As the relation between the scope of the clean hands principle and the legality requirement has remained unclear (*see infra* ¶ II(C)), it has not been prejudged whether the requirement contained in BITs of making the investment in accordance with the laws and regulations of the host state relates only to the issue of legality of the investment or also the requirement of clean hands of an investor. Following the view that puts an equation mark between illegality and unclean hands,[24] or the approach that perceives the clean hands doctrine as a broader term than, but includes, the requirement of the legality of investment, such an expression in a treaty would constitute grounds to apply that defense.

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[18] Diehl, *supra* note 13, at 124.

[19] Phoenix Action Ltd. v. Czech Republic, ICSID Case No. ARB/06/5.

[20] Phoenix Action Ltd. v. Czech Republic, ICSID Case No. ARB/06/5, Award, ¶ 101 (Apr.15, 2009).

[21] de Alba, *supra* note 9, at 325

[22] Kałduński, *supra* note 4.

[23] Dumberry, *supra* note 7, at 235.

[24] Kałduński, *supra* note 4.

In the lack of such a requirement in the treaty, it has been indicated that the clean hands principle can be applied by investment tribunals as a general principle of law.[25] Aleksandr Shapovalov argues that the clean hands principle is similar to the principle of good faith and "to the rule prohibiting one from benefiting from his/her own wrongful conduct, which is also considered by some scholars to be a general principle of law."[26] The approach presented by Shapovalov is quite uncommon. He argues that despite the clean hand principle and the prohibition against a party benefiting from its wrongful conduct being similar, they are distinct. The majority of scholars and tribunals, on the other hand, refer to the meaning of the clean hands principle as the rule prohibiting a party from benefiting from the wrongful conduct, and thus perceiving it as a synonym.[27] However, it has been commonly agreed that the clean hands principle does not fall under general customary international law.[28] "The principle … (*inadimplenti non est adirnplendurn*) is so just, so equitable, so universally recognized that it must be applied in international relations …"[29]. Thus, even though the principle does not fall under general customary international law, the authors argued the doctrine of clean hands constitutes a source of law that can be applied by international tribunals in line with Article 38 (1)(c) of the ICJ Statute ("the general principle of law recognized by civilized nations") and therefore enables the arbitral tribunals to refer to it in investor-state arbitration.[30].

Some tribunals adopted the view that the principle of clean hands constitutes a

[25] Douglas, *supra* note 2, at 156.

[26] Aleksandr Shapovalov, Should a Requirement of "Clean Hands" Be a Prerequisite to the Exercise of Diplomatic Protection? Human Rights Implications of the International Law Commission's Debate, 20 AM. U. INT'L L. REV. 829, 839 (2005).

[27] de Alba, *supra* note 9, at 323; Douglas, *supra* note 2, at 167; Dissenting Opinion of Judge Schwebel, *supra* note 12, at 75.

[28] Filip Balcerzak, Investor – State Arbitration and Human Rights 146 (Brill, 2017).

[29] Elisabeth Zoller, Peacetime Unilateral Remedies: An Analysis of Countermeasures 16–17 (1984).

[30] Patrick Dumberry & Gabrielle Dumas-Aubin, When and How Allegations of Human Rights Violations Can Be Raised in Investor-State Arbitration 13 J. OF WORLD INV. & TRADE 349, 364 (2012).

general principle of international law.[31] However, reliance on this doctrine by investment tribunals has not been devoid of controversies.[32] In some of the cases, tribunals explicitly rejected the possibility of applying a doctrine of clean hands. For example, in *South American Silver v. Bolivia*, the tribunal rejected the application thereof.[33] It stated that firstly, the treaty itself does not include any reference to the clean hands principle.[34] Secondly, it proceeded with addressing the existence of the clean hands doctrine in the form of a general principle of law.[35] Ultimately, the tribunal found that Bolivia did not provide sufficient evidence to prove that this doctrine is widely recognized between the states.[36] Similarly, in *Glencore Finance v. Bolivia*, in its procedural order, the tribunal found that the application of the clean hands principle remains uncertain and it will have to not only "determine its status, but also lay out its contours."[37]

Another basis that has been invoked with regard to the application of the clean hands principle in practice was reliance on the violation of international public policy.[38] In *World Duty Free Company Limited v. The Republic of Kenya*, the tribunal denied its jurisdiction to decide on a dispute based on the claimant's "unclean hands."[39] The claimant was involved in the act of bribery, which violated international

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[31] *See*, *e.g.*, Plama Consortium Limited v. Republic of Bulgaria, ICSID Case No. ARB/03/24, Award (Aug.27,2008) ¶ 144 46; Inceysa Vallisoletana S.L. v. Republic of El Salvador, ICSID Case No. ARB/03/26, Award (Aug.2, 2006) ¶ 240-42; Hesham Talaat M Al-Warraq v. Indonesia, *supra* note 14, Final Award, ¶ 646 47; Gustav F W Hamester GmbH & Co KG v. Republic of Ghana, ICSID Case No. ARB/07/24, Award (Jun.18, 2010) ¶ 124, *available at* https://www.italaw.com/sites/default/files/case-documents/ita0396.pdf.

[32] Balcerzak, *supra* note 30.

[33] South American Silver, Ltd., Award, ¶ 346.

[34] *Id.* ¶ 441.

[35] *Id.* ¶ 439-53.

[36] *Id.* ¶ 453.

[37] Glencore Finance (Bermuda) Limited v. Plurinational State of Bolivia, Permanent Court of Arbitration, Procedural Order No 2, ¶ 47 (Jan. 31, 2018), *available at* https://www.italaw.com/sites/default/files/case-documents/italaw9491.pdf.

[38] de Alba, *supra* note 9, at 326.

[39] World Duty Free Co. Ltd. v. Republic of Kenya, ICSID Case No. ARB/00/7, Award, ¶ 157 (Oct. 4, 2006).

public policy in the view of the tribunal. Similarly, the tribunal in *Al-Warraq*[40] held that since the claimant's actions were prejudicial to the public interest, they fell under the scope of clean hands doctrine, by which the tribunal emphasized the relation the clean hands principle and international public policy. It has been, therefore, argued that application of the clean hands principle through transnational public policy could help to avoid the controversies concerning the unsettled status of the clean hands principle as a general principle of law.[41]

Therefore, as demonstrated in legal doctrine and case law, despite a lack of clarity as to the status of that principle in the regime of international investment law, tribunals have attempted to find grounds on which it can be applied—either as an explicit requirement included in BITs or through other means such as a general principle of law or international public policy.

C. *Temporal Scope.*

There is a prevailing view that the requirement of an investor to act in accordance with the clean hands principle should cover both the establishment of the investment phase as well as subsequent performance of an investor (as opposed to the legality requirement which covers merely the establishment stage).[42] As observed by Dumberry,[43] the first indication as to the temporal scope of legality and the principle of clean hands was made by the arbitral tribunal in the *Yukos* case.[44] It stated that the scope of the legality requirement is limited to the establishment phase, noting that any post-establishment wrongdoing allegations should be made under the principle of clean hands operating as a general principle of law. The view that the legality requirement should pertain to the admission stage with regards to the jurisdiction has been widely accepted in legal writing and case law since establishing

[40] Hesham Talaat M Al-Warraq v. Indonesia, supra note 14.

[41] Lodovico Amianto, The Role of "Unclean Hands" Defences in International Investment Law, 6 MCGILL J. DISP. RES. 1, 23 (2019).

[42] Dumberry, *supra* note 7; Kałduński, *supra* note 4, at 99.

[43] Dumberry, *supra* note 7 at, 240.

[44] Yukos Universal Limited (Isle of Man) v. The Russian Federation, UNCITRAL, PCA Case No. AA 227.

the investment in violation of host's laws and regulations deprives the investment project of the investment status under the treaty.[45] Aloysius Llamzon and Anthony Sinclair argued that subsequent illegality of the investment could have an impact on the merits of the case; however, it would not deprive the tribunal of its jurisdiction[46] (even though the tribunal in the *Yukos* case indicated that the illegality of the investment should be assessed with regard to the initial stage and any subsequent infringement should be alleged under the principle of clean hands).

The same rationale applies to violations of human rights. It does not deprive the investment of its status under the treaty but rather impacts the admissibility of the claim or plays a role with regard to the merits of the dispute.[47] Moreover, as argued, the clean hands principle should have an impact on the admissibility of the claim (see further *infra* § III).

D. *Specific Cases of Violation of the Clean Hands Principle*

There is no explicit definition of the notion of "unclean hands" in the investment law context. The unclear approach to the principle of clean hands as a general principle of law makes it even more difficult. As already indicated, the operation of the clean hands doctrine is controversial not only in terms of its substance but, most importantly, its existence. The wording of BITs requirement for the investment to *be made in accordance with the laws and regulations of the host state* does not resolve the issue. What makes it even more complicated is the fact that not all violations of laws and regulations of the host state lead to the deprivation of protection under the investment treaty. Nonetheless, BITs do not provide any standard for the assessment of the infringement and its impact on the protection.[48] A certain guidance in the

[45] See, e.g. Aloysius Llamzon and Anthony Sinclair, Investor Wrongdoing in Investment Arbitration: Standards Governing Issues of Corruption, Fraud, Misrepresentation and Other Investor Misconduct, in LEGITIMACY: MYTHS, REALITIES, CHALLENGES (Albert Jan van den Berg (ed) Kluwer 2015); Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines, supra note 16.

[46] Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines, ICSID Case No. ARB/03/25, Award, ¶ 345 (Aug. 16, 2016).

[47] Llamzon & Sinclair, *supra* note 49, at 528–29.

[48] de Alba, *supra* note 9, at 327.

subject matter can be derived from one of the awards—*Teinver v. Argentine Republic*.[49] The tribunal stated that an illegal investment can be a result of the lack of proper consent to sign a contract, fraud in a tender procedure, corruption or failure to meet public procurement requirements. Nonetheless, this enumeration is not helpful with regard to situations in which there is a need to assess whether the investor's behavior that is on its face in conformity with the law should be protected under the treaty or not.[50] In fact, the tribunal in *Teinver v. Argentine Republic* shed more light on what types of violations may amount to the illegality of the investment as such. However, as illustrated in a greater detail hereinbelow, the concept of the illegality of the investment constitutes only one of several examples of the clean hands principle. The author will argue that the scope of illegality overlaps with the clean hands principle, as the latter one is a broader concept and also covers wrongdoings other than non-conformity with the host state's laws and regulations.

1. Infringement of Human Rights

The issue whether arbitral tribunals should take into account human rights infringements committed by investors has been a subject of debate.[51] One of the controversies concerns the relation between the illegality of the investment as such and the unclean hands. In legal writing, it has been advocated that tribunals, whilst deciding on an investment dispute, should take into consideration human rights violations, provided that the relevant BIT contains a broadly worded dispute resolution clause and whether these violations relate to the investment in question.[52] Otherwise, it could be argued that in case the tribunal found violations of human rights, it went beyond the scope of its powers, which creates a risk of setting aside. Examining potential human rights violations committed by an investor in another country or another investment project would be a step too far taken by tribunals as

[49] Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A., supra note 15.

[50] Diehl *supra* note 13, at 126.

[51] *See e.g.* Dumberry, *supra* note 7; Kałduński, *supra* note 4; Balcerzak, *supra* note 30.

[52] Dumberry & Dumas-Aubin, *supra* note 32, at 367

the actions undertaken by an investor elsewhere are likely not relevant to the subject matter of the dispute.[53] Additionally, not all kinds of violations of human rights should deprive an investor of a treaty protection. Serious violations directly related to the investment should result in the lack of jurisdiction, whereas minor infringements could have an impact on the merits phase of the proceedings, the amount of awarded compensation, etc.[54] That is due to the fact that in the former situation, the wrongdoing may lead to the investor's project not qualifying as an investment within the meaning provided for in the treaty.

On the other hand, it has been argued that there is no general binding obligation for an investor to protect human rights. It has been suggested that since international investment law or international agreements do not impose obligations upon investors to comply with provisions concerning human rights, it would be at the host states' discretion whether to impose such a requirement.[55] A point was made to the contrary stating that under the principle of clean hands, in cases of a violation of fundamental human rights, an investor's claim should be found inadmissible even if the obligation to comply with international human rights was not implemented in domestic law.[56] It was noted, however, that if one was to perceive protection of fundamental human rights as a general principle of international law or a norm of a *jus cogens* nature, referral to the doctrine of clean hands would be unnecessary.[57] The effect would be the same.

Despite the issue being commented on in legal writing, human rights violations constituting one of the types of unclean hands remains in the theoretical field as investment tribunals have not yet been concerned with the issue of human rights abuses.[58] Interestingly, in *South American Silver v. Bolivia*, the tribunal, on the one

[53] *Id.*

[54] Kałduński, *supra* note, 4 at 97–98.

[55] *Id.* at 98.

[56] Balcerzak, *supra* note 30, at 147.

[57] *Id.*

[58] Kałduński, *supra* note 4, at 97.

hand, that the clean hands doctrine invoked by Bolivia was not explicitly referred to in the BIT and does not constitute a general principle of international law nor international public policy, and thus the respondent's defense in this regard failed. On the other hand, the tribunal concluded that there is no need to expressly refer to the protection of human rights to secure its compliance:

> The Tribunal cannot understand that the mere absence of a sacramental formula to expressly refer to human rights or to the protection of the communities may lead to the conclusion that the Reversion was not conducted in a social benefit related to the internal needs of Bolivia.[59]

Despite rejecting the application of the principle of clean hands, the tribunal held that given the circumstances relating to the investment, reversion of mining concessions by Bolivia amounted to a lawful expropriation that satisfied a public purpose and entailed a social benefit.

2. Corruption

One of the most frequently invoked examples of violation of clean hands principle concerns the case of corruption. Having regard to the particularities of international investment law, corruption would essentially include an existing (or yet to be formed) relationship between a foreign investor and a public official of the host state and un undisclosed payment made in the expectation of a favourable public decision.[60] The application of that principle is based on the notion that since corruption is of a consensual nature (as investors and host state officials are involved most typically in an uncoerced act of bribery), it would be unfair to shift the consequences solely on one party involved in the act.[61] What must be underlined is that due to its bilateral nature, corruption issues can be raised by both an investor and a state.[62] Nonetheless, corruption claims have been raised by investors far less frequently than

[59] South American Silver v. Bolivia, supra note 14 ¶ 561.

[60] Llamzon & Sinclair, *supra* note 49, at 460.

[61] Aloysius P Llamzon, CORRUPTION IN INTERNATIONAL INVESTMENT ARBITRATION 215 (Oxford: Oxford University Press, 2014).

[62] Llamzon & Sinclair, *supra* note 49, at 463.

host states since in most situations it would also implicate the involved investors.[63] It has been emphasised that corruption or bribery is a very particular subcategory of an investor's behaviour which violates the legality requirement existing in the BIT (expressly included or implicit).[64] Even though corruption concerns can be raised by both an investor and a host state, their behaviour will lead to different legal consequences. In case an investor bases its claim on the host state's wrongdoing in the form of corruption/extortion, the tribunal will deal with it at the merits phase. The situation is more complicated with regard to the potential investor's misconduct—it can be an issue for jurisdiction, admissibility or merits given the particular circumstances of the case under consideration.[65] It can be argued that with regard to corruption, its consequences can be twofold. On the one hand, if corruption occurred at the admission stage and constituted a violation of laws and regulations of the host state, it could lead to finding the investment illegal and thus deprive the tribunal of its jurisdiction. On the other hand, if corruption occurred at the post-establishment phase, it would fall under the clean hands doctrine and, therefore, pertain to the admissibility of claims or merits of the dispute.

The majority of legal systems prohibit corruption, and it has severe consequences.[66] As corruption and bribery are condemned by the international community, the investors' defense consisting in the lack of knowledge of national regulations as an excuse for their wrongdoing cannot be "credibly pleaded in case of in case of corrupt behaviour."[67] It is also highly unlikely that an investor would successfully assert that such a breach of a host state's laws and regulations concerned

[63] *Id.*

[64] Marc Bungenberg, *et al.*, INTERNATIONAL INVESTMENT LAW: A HANDBOOK 577 (Mu̎nchen: Beck, 2015).

[65] Utku Cosar, Claims of Corruption in Investment Treaty Arbitration: Proof, Legal Consequences and Sanctions, in LEGITIMACY: MYTHS, REALITIES, CHALLENGES 539 (Kluwer Law International 2015).

[66] de Alba, *supra* note 9, at 327.

[67] Bungenberg, *supra* note 69, at 578.

a mere formality.[68] With regard to corruption allegations, tribunals have also relied on the good faith principle in lieu of explicitly naming it as the principle of clean hands. They have done so by arguing that the host state corruption defense should fail as the state was not behaving in line with good faith principle—either due to the fact that its state officials were involved themselves in the wrongdoing or corruption was pursued by the state's government as a tool of retribution and persecution.[69] Bribery was also found to constitute a violation of public policy in one of the leading investment arbitration cases in the subject matter—*World Duty Free v. Kenya.*[70] In that case, the tribunal declared its lack of jurisdiction on the basis that the investor's behaviour did not meet the legality requirement.

In general, with regard to the consequences of corruption and the temporal scope, Dumberry has argued that in the case of a serious violation of a host state's laws and regulations, such as bribery, tribunals should find a claim inadmissible not only in the establishment phase but also in the post-establishment phases of the investment.[71]

3. Fraud or Misrepresentation

Fraud or misrepresentation committed by an investor has been rarely discussed in legal writing. Nonetheless, in the context of foreign investment, fraud is understood as a wilful misrepresentation by an investor in order to convince the state's officials to act in a certain manner.[72] The rationale behind depriving an investor of protection is that the state would never have approved its project having known the truth. The majority of cases concerning fraud or misrepresentation resulted in the lack of jurisdiction of the tribunal to decide upon the dispute. It was caused either by the violation of legality requirement, domestic laws or international public policy. However, as noted in legal writing, fraud and misrepresentations can

[68] *Id.*

[69] de Alba, *supra* note 9, at 331.

[70] World Duty Free Co. Ltd., supra note 43, at ¶ 157.

[71] Dumberry, *supra* note 7, at 231.

[72] de Alba, *supra* note 9, at 328.

also have an impact on the admissibility of claims or the merits of the case, depending on the circumstances.[73] In the *Inceysa* case, the tribunal was concerned with the issue of fraudulent misrepresentations and non-disclosures made by the investor during the public bid process for obtaining concessions for mechanical inspection services.[74] The tribunal took into consideration the intent of the investor to make the fraudulent misrepresentations and found that such a behaviour constituted a violation of the good faith principle. Further, the tribunal relied on Latin maxims such as *nemo auditur propriam turpitudinem* and found that the investor cannot benefit from the treaty protection since "nobody can benefit from its own fraud."[75] Ultimately, the tribunal found that Inceysa was deprived of the treaty protection because the investment did not comply with the legality requirement under BIT.[76] *Inceysa v. El Salvador* constitutes an interesting example where the tribunal did not distinguish between the legality requirement and the principle of clean hands as such (even though the tribunal did not expressly refer to the wording "the principle of clean hands" but rather Latin maxims) and examined whether the investment was illegal due to the violation of the aforementioned principles. The Tribunal not only accepted the application of the clean hands doctrine but also equated it with the legality requirement.

In *Plama v. Bulgaria*, the tribunal applied the principle of clean hands "indirectly," relying on the Latin maxims. The respondent was alleging that the claimant made several misrepresentations and the investment was "the result of a deliberate concealment amounting to fraud, calculated to induce the Bulgarian authorities to authorize the transfer of shares."[77] The tribunal made an important distinction that if the illegality impacts an instrument that is extraneous to the investor-State

[73] Llamzon & Sinclair, *supra* note 49, at 472–73.

[74] Inceysa Vallisoletana S.L. v. Republic of El Salvador, *supra* note 34.

[75] Inceysa Vallisoletana S.L. v. Republic of El Salvador, ICSID Case No. ARB/03/26, Award (English translation), ¶ 242 (Aug. 2, 2006). *supra* note 34.

[76] *Id.* ¶ 337.

[77] *Id.* ¶ 128–29.

arbitration agreement, the alleged illegality will not raise an issue of jurisdiction but can be dealt with at the merits stage.[78] Thus, even though the tribunal recognized its jurisdiction to hear the case, it found the investor's claims inadmissible due to the violation of the clean hands principle. In the case at hand, the tribunal relied on the principle *nemo auditur propriam turpitudinem allegans* and international public policy:

> The Tribunal has decided that the investment was obtained by deceitful conduct that is in violation of Bulgarian law. The Tribunal is of the view that granting the ECT's protections to Claimant's investment would be contrary to the principle nemo *auditur propriam turpitudinem allegans* invoked above. It would also be contrary to the basic notion of international public policy.[79]

Involvement in fraud and misrepresentations made by the investor impacted the admissibility of its claim.

4. Legality as a Manifestation of the Principle of Clean Hands

It has been argued that the "investment made in accordance with law" clause can be regarded as a "manifestation of the principle of clean hands."[80] The doctrine of clean hands would thus be perceived as of dependent character, enshrined in the obligation of the state to make investments in accordance with the law—the plea of legality could result in lack of jurisdiction or inadmissibility of claims.[81] Therefore, the view that perceives the legality requirement as a manifestation of clean hands principle would in fact imply that the two notions have no separate meanings. The view presented by Marcin Kałduński that the clean hands principle in fact refers to the implicit legality requirement was criticised in legal writing.[82] The statement that the legality requirement is a manifestation of clean hands doctrine has been repeated by legal scholars; however, the meaning of these two concepts was not clearly distinguished. Some scholars have underlined that the legality requirement was a

[78] Luttrell, *supra* note 2, at 125.

[79] *Id.* at 143

[80] Kałduński, *supra* note 4, at 81.

[81] *Id.* at 96.

[82] Amianto, *supra* note 45, at 6.

"narrower" embodiment of the clean hands principle.[83] It has also been argued in legal writing that these two notions remain conceptually distinct from each other.[84] It remains unclear whether the doctrine of clean hands should have a broader scope of application than the legality requirement (both explicitly mentioned in the treaty itself and as an implicit requirement) or even whether they do exclude each other. The case law in this regard does not provide much guidance as the application of the clean hands doctrine as such was contested in some of the cases.[85] However, despite the general lack of consensus whether the doctrine of clean hands should be applicable, some tribunals have separately assessed the illegality and unclean hands objections raised by states.[86] That approach illustrates that tribunals have been treating these claims as separate notions, even though in some cases—*e.g. American Silver v. Bolivia*—tribunals have rejected the application of the clean hands doctrine.

*American Silver v. Bolivia* concerned the issue of an unlawful expropriation of the investment by Bolivia due to backlash from the local communities inhabiting the area. The respondent raised two assertions concerning the inadmissibility of the investor's claim. First, that the investor violated the principle of clean hands, and, second, the investment was illegal.[87] The illegality of the investment constituted an objection to the jurisdiction of the tribunal, and alternatively to the admissibility of the claims pursued by the investor. The claimant contested the application of the clean hands doctrine in the investor-state dispute settlement context and argued that no violations occurred during the admission of investment.[88]

Ultimately, the arbitral tribunal sided with the claimant, finding that the BIT did

[83] Rahim Moloo, A *Comment on the Clean Hands Doctrine in International Law* [2010] U. OF DURHAM STUDENT L.J. 39, 46 (2010).

[84] Amianto, *supra* note 45, at 8.

[85] E.g. South American Silver v. Bolivia, supra note 14.

[86] *See, e.g., id.*; *Hesham Talaat M Al-Warraq v. Indonesia*, *supra* note 14; Copper Mesa Mining Corporation v. Republic of Ecuador, Permanent Court of Arbitration, Award, ¶ 5.54, 5.60, (Mar.15, 2016), *available at* https://www.italaw.com/cases/4206.

[87] South American Silver v. Bolivia, supra note 39 ¶ 348-61.

[88] *Id.* at 393, 412.

not contain any reference to the clean hands doctrine, nor did it constitute a general principle of law. In the tribunal's view, "Bolivia did not submit sufficient evidence to establish that the clean hands doctrine enjoys the required recognition and consensus among the States to reach the status that Bolivia attributes to it."[89] Despite rejection of the principle of clean hands, the tribunal's decision is relevant to differentiate of differentiation between the scope of illegality and unclean hands.

Violation of host state's legal provisions was serving as one of the examples where the principle of clean hands could deprive the investment of protection in cases of deliberate and fundamental infringement[90]. It was recognized that not all violations of host state's provisions would lead to the application of clean hands principle and render the investment illegal. The tribunals have been denying pleas of illegality of the investment based on "technical violations" and "minor errors"[91]. In one of the cases, *Metalpar v. Argentina*, the Tribunal found that incompliance with company registration procedure (which itself impose certain sanctions) cannot deprive the investor of protection under the treaty as such a measure would be disproportionate.[92] Therefore, only violations amounting to a serious infringements should lead to the lack of tribunal's jurisdiction and, in other instances, have a potential impact on the merits of a dispute.

5. The Host State's Wrongdoing

One of the possible scenarios in which the principle of clean hands can be applied relates to the wrongdoing of the host state. In *Georg Gavrilovic & Gavrilovic d.o.o. v. Republic of Croatia*, Croatia objected to the tribunal's jurisdiction alleging that the claimants acquired the investment in irregular bankruptcy proceedings.[93] The tribunal ultimately concluded that the state's own officials were involved in the

[89] *Id.* at 445.

[90] de Alba, *supra* note 9, at 329.

[91] Douglas, *supra* note 2, at 156.

[92] Metalpar S.A. and Buen Aire S.A. v. The Argentine Republic, ICSID Case No, ARB/03/5, Decision on Jurisdiction, ¶ 84 (Apr. 27, 2006).

[93] Georg Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia, ICSID Case No. ARB/12/39.

process.[94] Therefore, by contributing to the violation of its own laws and regulations, the state breached the principle of good faith and "it cannot take the advantage of that breach to challenge the jurisdiction of an international tribunal."[95] In *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, the Tribunal being concerned with the issue of fraud concluded that: "principles of fairness should require a tribunal to hold a government estopped from raising violations of its own law as a jurisdictional defense when it knowingly overlooked them and endorsed an investment which was not in compliance with its law."[96] Most typically, the investors' allegations concerning the host states' misconduct concern: extortion/solicitation of corrupt payments, host state misrepresentation of investment terms or conditions, other illegal conduct.[97] It has been underlined in legal writing that unlike other types of misconduct, "it always takes two to tango" with regard to corruption.[98] Burdening an investor with negative consequences without taking into consideration the contributory fault of the host state and depriving the investment of treaty protection would unjustly favor the state's wrongdoing. Thus, the application of the principle of clean hands in this regard prevents the host state from benefiting from its own misconduct and shifting the responsibility onto an investor.

## VII. CONSEQUENCES OF UNCLEAN HANDS

There are various potential legal consequences of the unclean hands of a party. The tribunals' decisions in this regard mostly depend on the wording of the treaty and particular circumstances of the case. Even though predictability and consistency of arbitral awards are desired in international investment arbitration, it is necessary to maintain room for flexibility as there are a number of factors that arbitrators are faced with to properly assess the legal consequences of the wrongdoing of either an

[94] Georg Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia, ICSID Case No. ARB/12/39, Award, ¶ 296 (Jul.26, 2018).

[95] Luttrell, *supra* note 2, at 128.

[96] Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines, supra note 50, ¶ 346.

[97] Llamzon & Sinclair, *supra* note 49, at 530.

[98] Bungenberg, *supra* note 69, at 586.

investor or a host state.[99]

Taking into consideration the reasoning of arbitral tribunals and emerging views in legal writing, the specific type of misconduct of a party resulting in its unclean hands will also have a significant impact on the outcome of a dispute. Llamzon and Sinclair argue that the unclean hands of an investor may lead to three possible scenarios: (i) a lack of jurisdiction; (ii) the inadmissibility of the claim; or (iii) an impact on the merits of the case. With regard to the investors' allegations that host states were engaged in certain wrongdoing and, therefore, it is the host state that has unclean hands, these matters will be dealt with by tribunals in the merits.[100] That is due to the fact that under majority of investment treaties the claims can be brought solely by the investors and the possibility of counterclaims is quite limited.[101] Thus, any actions undertaken by the host state will not impact the investor's possibility to bring the claim.

A. *Lack of Jurisdiction*

The lack of jurisdiction of the tribunal in an investment dispute consists in a situation in which "the tribunal itself is incompetent to give any ruling at all whether as to the merits or as to the admissibility of the claim."[102] To put it simply, jurisdiction of the tribunal concerns whether the tribunal is competent to hear the dispute an investor submitted to it.[103] It has been argued that the illegality of the investment (the so-called "narrower embodiment of the principle of good faith") should result in the lack of jurisdiction either because it does not qualify as an investment (*ratione materiae*) or that there is no consent of the state to submit the dispute to arbitration (*ratione voluntatis*).[104] One of the examples of how a violation of a host state's laws and regulations may result in the lack of jurisdiction is through an abuse of process.[105]

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[99] Cosar, *supra* note 70, at 549.

[100] Llamzon & Sinclair, *supra* note 49, at 537.

[101] Bungenberg, *supra* note 69, at 1122.

[102] Llamzon & Sinclair, *supra* note 49, at 523.

[103] Bungenberg, *supra* note 69, at 1220.

[104] Llamzon & Sinclair, *supra* note 49, at 529; Balcerzak, *supra* note 30, at 148.

[105] Emily Sipiorski, Good Faith in International Investment Arbitration 193 (Oxford University

Several arguments have been made to justify the jurisdictional implications of the illegality of the investment. Firstly, as already mentioned, the consent to arbitrate investment disputes of the host state does not extend to disputes concerning the investments that were established with the violation of its own laws and regulations. Secondly, the tribunal has to consider general principles of law such as the good faith principle and the clean hands doctrine which should guide the tribunal in declining its jurisdiction. And lastly, the tribunals are under the obligation to respect the integrity of the national law of the host state and thus decline its jurisdiction "upon a successful plea of illegality."[106] However, only the illegality at the outset of the investment will affect the jurisdiction of the arbitral tribunal, as any unlawful behaviour at the post-establishment phase will not be a matter of a jurisdictional challenge but rather a question for the merits.[107] That is because unlawful behaviour at the establishment stage can result in the investment project not being qualified as an investment within the meaning of the treaty.

Therefore, concluding the findings concerning the lack of jurisdiction of the arbitral tribunal as the consequence of a violation of the clean hands principle, there are several points that must be emphasized. First, only the wrongdoing on the investor's part rendering the investment illegal can result in the lack of jurisdiction of the tribunal as the wrongdoing of the state would be dealt with at the merits stage. Second, the wrongdoing of investors would need to amount to a serious violation of the legality requirement (included expressly in BITs or as a general principle of law) to deprive the investment of treaty protection. Third, the violation of a host state's laws and regulations would have to occur at the admission phase of the investment; otherwise, it would be an issue for the merits of the case.

B. *Inadmissibility of Claims*

Inadmissibility of the claim is a different legal consequence of the unclean hands of an investor. It concerns "the power of the tribunal to decide a case at a particular

Press, 2019).

[106] Douglas, *supra* note 2, at 156.

[107] *Id.*

point in time in view of possible temporary or permanent defects of the claim."[108] With regard to the admissibility of the claims, the tribunal is concerned with particular claims whereas with jurisdictional objections, the tribunal's general competence to hear the dispute is involved. Even if the tribunal has the jurisdiction to hear a dispute, it will not adjudicate the merits of the case—in that way inadmissibility resembles the lack of jurisdiction of the arbitral tribunal as in both instances the claim will be dismissed prior to the analysis of the merits.[109] As observed by scholars, the instances of unclean hands of investors (other than the illegality of the investment)[110] should raise a question of the admissibility of a claim.[111] In particular, violations of international human rights which were not implemented into domestic legal orders should preclude the treaty protection of the investment.[112] It has been submitted that violations of human rights should result in the inadmissibility of an investor's claim "precisely because of its unacceptable behaviour."[113] Another example of an investor's wrongdoing that should result in the inadmissibility of a claim concerns corruption.[114] It has been nonetheless underlined that if an investor procured its investment through corruption violating the treaty containing an "in accordance with the law clause," the tribunal would actually lack the jurisdiction *ratione materiae* to hear the dispute.[115] Cosar proposes that in the case that the treaty does not contain an "in accordance with law" clause, tribunals could still deny the investors treaty protection by dismissing the claim as inadmissible, *e.g.* in cases concerning the Energy Charter

[108] Bungenberg, *supra* note 69, at 1213.

[109] Fabio G Santacroce, Navigating the Troubled Waters Between Jurisdiction and Admissibility: An Analysis of Which Law Should Govern Characterization of Preliminary Issues in International Arbitration, 33 ARB. INT'L 539, 540 (2017).

[110] Llamzon & Sinclair, *supra* note 49, at 529.

[111] Balcerzak, *supra* note 30, at 147.

[112] *Id.*

[113] Dumberry & Dumas-Aubin, *supra* note 32, at 362.

[114] Cosar, *supra* note 70, at 546.

[115] *Id.* at 541.

Treaty which does not contain a legality requirement.[116] However, that is not necessarily always the case. Despite the lack of an express legality requirement in some BITs, the tribunal may still declare its lack of jurisdiction on account of the investment being made illegally, assuming that such a requirement is made implicit in the treaty. In *Phoenix Action Ltd. v. Czech Republic*, the tribunal underlined that it is not necessary to include an express clause requiring the investment to be made "in accordance with the law of the host state" in the text of the treaty as it can be implied from the principle of good faith.[117] Therefore, one can conclude that the illegality of the investment at the establishment phase should result in the lack of jurisdiction– both as a violation of a BIT requirement and a violation of a general principle of law, and other instances of the unclean hands of the investor. For example, infringement of human rights and corruption should result in the admissibility of the claim. Furthermore, as opposed to the temporal scope of the plea of the lack of jurisdiction of the tribunal, which relates to the admission stage of the investment, the inadmissibility of the investors' claims relates to a broader temporal scope. As found in *Al-Warraq v. Indonesia*,[118] the clean hands doctrine is applicable in the case of the investors' wrongdoing throughout the lifespan of the investment.

C. *Merits*

Even if the tribunal does not decline its jurisdiction to hear the dispute and find the claim admissible, the unclean hands of both an investor and a host state may have an influence over the merits of the case.[119] These situations are mostly divided into two categories. First category includes the host states' misconduct consisting of corruption, fraud or breach of the investors' legitimate expectations, and other types of illegal behaviour of the host state. Secondly, certain actions of the investors may not have a direct impact on jurisdiction or admissibility of the claim but rather be the issue for the merits. Such would include the investors' misconduct during the post-

[116] *Id.* at 545.

[117] Phoenix Action Ltd. v. Czech Republic, supra note 22, at 106

[118] Hesham Talaat M Al-Warraq v. Indonesia, supra note 14.

[119] Seifi & Javadi, *supra* note 10, at 124.

establishment phase of the investment, as opposed to its admission, or modification of the domestic law of the host state after the establishment of the investment.[120] For example, the incompliance with the host state's laws and regulations occurring after the establishment phase in *Yukos* resulted in the reduction of the damages owed to claimants by 25% due to their violation of tax law of the host state.[121]

In *Mamidoil*, the tribunal initially rejected the jurisdictional objections, later on to find that non-compliance with the law of the host state by the claimant had an impact on the merits phase of the dispute.[122] Albania raised that the tribunal lacked jurisdiction because the investor failed to procure the required permits which made the investment illegal. Nonetheless, the tribunal found this argument to be more appealing at the merits stage of the proceedings and even though it acknowledged its jurisdiction, it rejected the claimants' claim concerning violation of fair and equitable treatment standard as: "Claimant is not entitled to rely on the perpetuation of its activities in illegal circumstances and cannot claim a violation of legitimate expectations with respect to the illegal operation of the tank farm."[123]

## VIII. CONCLUDING REMARKS

Even though the clean hands principle has gained some attention from arbitral tribunals, its status has remained outside of the attention of legal scholars with relatively few articles written about it.[124] The increasing number of arbitral awards may ignite a much needed change with regard to providing more clarity to the status of this principle. On the one hand, the existence and functioning of the principle of clean hands in practice (and even in theory) has been a subject of debates. Legal scholars and arbitral tribunals not only differ with the approach to the scope thereof

[120] Llamzon & Sinclair, *supra* note 49, at 530

[121] Yukos Universal Limited (Isle of Man) v. The Russian Federation, supra note 48.

[122] Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania, ICSID Case No. ARB/11/24.

[123] Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania, ICSID Case No. ARB/11/24, Award, ¶ 716 (Mar. 30, 2015).

[124] Ori Pomson, The Clean Hands Doctrine in the Yukos Awards: A Response to Patrick Dumberry, 18J WORLD INV & TRADE 712, 712–13 (2017).

but the issue goes much further—its very existence has been questioned.[125] The differentiation between the principle of clean hands and the legality requirement (either explicitly included in treaties or derived from the general principles of law) constitutes one of the underlying reasons for lack of consistency in the approach to the wrongful behaviour of either an investor and a state. Thus, there is a need for more clarity in this regard. On the other hand, however, it is an extremely difficult task to adopt a uniform approach to the issue of the clean hands principle as a whole. The legal consequences largely depend on the type of the misconduct, its temporal scope, and relevant factual circumstances of the case.

In the author's view, it is essential to establish uniform grounds for the application of the clean hands doctrine and simultaneously afford flexibility to tribunals concerning potential consequences of its application. It would be incorrect for the clean hands principle to be equated with the issue of illegality of the investment. As indicated hereinabove (see § II(C)), the clean hands doctrine conveys several distinctive types thereof, including the violation of host state's laws and regulations. However, the differentiation between these two frequently mixed concepts is needed due to several reasons. The clean hands doctrine extends to both investors and states as the wrongdoing of the state's officials, for which the host state is responsible, may result in dismissal of its allegations and ultimately have an impact on the merits of the case. For example, in a case where the state's officials are voluntarily involved in the act of corruption, the wrongdoing will most likely not result in the lack of jurisdiction of the arbitral tribunal. As both parties are equally involved in the act, it would be unfair to burden only one party with the negative consequences and deprive the investment of its treaty protection. Moreover, the clean hands principle relates to a broader temporal scope than the legality requirement. The latter one will only be assessed at the time of the establishment of the investment, whereas under the clean hands doctrine, investors and states' wrongdoing may have an impact on the merits of the case (admissibility of investor's claim) throughout the whole lifespan of an investment. Lastly, specific types of unclean hands will result in different legal

[125] See e.g. South American Silver v. Bolivia, supra note 14.

consequences. Whilst the illegality of the investment at its initial stage will result in the lack of jurisdiction of the tribunal, other examples of the investors and states misconduct could have an impact either on the inadmissibility of the claim or the merits of the case.

In conclusion, more clarity with regard to the status of the principle of clean hands would benefit the investor-state dispute settlement system, however, there is a need for room for flexibility as to the legal consequences of the wrongdoing. As for now, the tribunals have been differing in their approaches, questioning the application of this principle in the international investment law context, which creates undesired confusion and unpredictability of the awards and, as a result, undermines the legitimacy of the system.

**AGATA ZWOLANKIEWICZ** is a law graduate from the University of Silesia in Poland and an LL.M. Candidate at the University of Ottawa in Canada. She was awarded Edward Barry McDougall Memorial Scholarship for Graduate Studies in Law. Currently, she is a summer research fellow at the Columbia Center on Sustainable Investment (a joint center of Columbia Law School and The Earth Institute, Columbia University) where she focuses on investor-State dispute settlement matters.

Agata has participated in numerous moot court competitions and received Honourable Mention for Best Oral Advocate at the Vis Moot East in Hong Kong in 2019 and was a winner of the 4th edition of Konrad & Partners' Arbitrators' Quest in Vienna in 2018. She spent two months with the Konrad&Partner's arbitration practice group at their Vienna office.

During her studies, Agata was gaining practical experience conducting legal internships in Austria, Canada, and Poland. In her professional and academic activity, she focuses on commercial and investment arbitration, and litigation.

# THE SINGAPORE CONVENTION: NOT MUCH THERE, THERE

*by* David J. Stute & Alexis N. Wansac

## I. INTRODUCTION

The United Nations Convention on International Settlement Agreements Resulting from Mediation ("Singapore Convention"), meant to facilitate the enforcement of international commercially mediated settlements, was adopted in December 2018 and opened for signature the following August.[1] By January 2021, six countries, most significantly Singapore and Saudi Arabia, had ratified the Convention, and a total of 52 countries had signed the Singapore Convention, including the US, China, and India.[2]

At a time of receding multilateralism on the international stage, any broad expression by several dozen countries of their willingness to cooperate is noteworthy. And, indeed, "amidst much fanfare and excitement,"[3] the Singapore Convention was received enthusiastically as "a development that the arbitration and mediation fraternity alike has cause to celebrate."[4] Commentators noted that the Singapore Convention will "legitimise mediation as a means of dispute resolution,"[5] and described it as the "most credible acknowledgement of mediation as a meaningful

[1] United Nations Convention on International Settlement Agreements Resulting from Mediation, opened for signature Aug. 7, 2019 [hereinafter Singapore Convention].

[2] For the status of the Singapore Convention, see Status: United Nations Convention on International Agreements Resulting from Mediation, U.N. COMM'N ON INT'L TRADE LAW [UNCITRAL], https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/status.

[3] Dan Perera & Joyce Fong, The Singapore Convention on Mediation—The Beginning of a New Era?, REED SMITH CLIENT ALERTS (Aug. 7, 2019), https://www.reedsmith.com/en/perspectives/2019/08/the-singapore-convention-on-mediation.

[4] Iris Ng, The Singapore Convention: What Does It Mean for Arbitration and the Future of Dispute Resolution, KLUWER ARB. BLOG (Aug. 31, 2019), http://arbitrationblog.kluwerarbitration.com/2019/08/31/the-singapore-mediation-convention-what-does-it-mean-for-arbitration-and-the-future-of-dispute-resolution.

[5] Michael Fletcher, *Signed But Not Sealed*, 169 NEW L.J. 7856, 9679 (2019).

tool to resolve cross-border commercial disputes."[1] Further, predictions forecast that "the [Singapore] Convention will make it easier for businesses to enforce mediated settlement agreements with their cross-border counterparts."[2] US industry groups, including the Chamber of Commerce, summed up the sentiment in a letter to the US State Department:

> The treaty negotiation was launched . . . with the aim of developing a cost-effective international legal mechanism for resolving cross-border commercial disputes between private parties. By encouraging the use of mediation as a viable path to resolving commercial disputes, the Convention reduces cost and eliminates the need for duplicative litigation. The Convention also improves the enforcement process by obliging governments to recognize the legal status of any mediated settlement. As a result, the Singapore Convention helps mitigate risk when entering into a commercial relationship with businesses in foreign markets and raises the standards of fair trade globally.[3]

Initial perceptions aside, however, there is a question as to whether the Singapore Convention as adopted will prove capable of living up to the hype of being a mediation analog to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).[4] The real test for the Singapore Convention will be at the ratification stage. Without achieving the near-universal recognition of the New York Convention, which as of 2019 had been ratified in 160 countries,[5] the Singapore Convention will have no more impact than other multilateral instruments,

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[1] Deborah Masucci & M. Salman Ravala, *The Singapore Convention: A First Look*, 11 N.Y. DISP. RESOL. L. 60, 61 (2018).

[2] *The Singapore Mediation Convention*, JONES DAY ALERTS (Sept. 2018), https://www.jonesday.com/en/insights/2018/09/the-singapore-mediation-convention.

[3] Letter from Coalition of Service Industries, National Association of Manufacturers, National Foreign Trade Council, U.S. Chamber of Commerce, and United States Council for International Business, to Secretary of State Michael R. Pompeo, Nov. 6, 2018, *available at* https://www.uscib.org/uscib-content/uploads/2018/11/Coalition_SignaporeConvention onMediation_11.6.18.pdf.

[4] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 38, 7 I.L.M. 1046 [hereinafter New York Convention].

[5] *Cf.* Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards, UNCITRAL, https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2.

such as the Convention on Choice of Court Agreements, which was adopted by the Hague Conference on Private International Law and opened for signature in 2005, but fell short of wide acceptance.[6]

Moreover, glowing comments about the Singapore Convention notwithstanding, why would the Convention's impact surpass that of either the UNCITRAL Model Law on International Commercial Conciliation[7] or the European Union (EU) Directive 2008/52 on certain aspects of mediation in civil and commercial matters ("EU Mediation Directive")[8]—neither of which have had much effect on the mediation landscape,[9] despite hopes that they would promote the use of mediation as a dispute settlement tool in a transnational context.[10] The Singapore Convention's premise that a treaty as such will move the needle as to parties' resort to mediation is yet to be seen.

Turning to the provisions of the Singapore Convention, this article expresses a note of caution: the Convention's enforcement provisions are vague and untested so as to raise doubt about whether reliance on the Singapore Convention leaves parties to a mediated settlement any better off than with a conventional settlement

[6] Hague Conference on Private International law, Convention on Choice of Court Agreements, June 30, 2005, 44 I.L.M. 1294 (entered into force Oct. 1, 2015) [hereinafter Hague Choice of Court Convention]. The Hague Choice of Court Convention has only been ratified by a handful of signatories, most notably the European Union, and took a full ten years to enter into force. While the United States became a signatory in 2009, it never ratified the Convention.

[7] UNCITRAL Model Law on International Commercial Conciliation (2002), *reprinted in* 33 UNCITRAL Y.B. 615.

[8] European Parliament and Council Directive 2008/52 of 21 May 2008 on certain aspects of mediation in civil and commercial matters, 2008 O.J. (L 136) 3 [hereinafter the E.U. Mediation Directive].

[9] Eunice Chua, *The Singapore Convention on Mediation—A Brighter Future for Asian Dispute Resolution*, ASIAN J. INT'L L. 1, 4 (2019) (noting that "the Singapore Convention goes further than the European Directive on Mediation (the EU Directive), which has not produced the hoped-for impact of growing the use of mediation in the EU").

[10] See id. at 4; see also European Parliament, "Rebooting" the Mediation Directive: Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediations in the EU, at 162 (2014), available at https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL-JURI_ET(2014)493042 (noting that "[t]he number of mediations, [is] on average less than 1% of all cases litigated in the EU," some five and a half years after the EU Directive's adoption).

agreement with a jurisdiction and choice-of-law clause. Principally, this article posits that the Singapore Convention's omission of straightforward enforcement and set-aside mechanisms is an unfortunate choice that may well render the Singapore Convention little more than an historical curiosity.

## II. A SYNOPSIS OF THE SINGAPORE CONVENTION'S ORIGINS

In many circles, international litigation and arbitration have been characterized as too expensive, too time-consuming, and too burdensome.[11] By way of contrast, mediation has been portrayed as a less costly, less combative alternative that allows parties to "save face."[12]

Yet unlike international commercial arbitral awards, which fall under the New York Convention's enforcement regime, mediated settlement agreements have reportedly been plagued by enforcement issues.[13] For instance, there is "evidence that mediated settlements are seen as harder to enforce internationally than domestically, which was said to disincentivize the use of mediation in cross-border disputes."[14] With the vision of putting settlement agreements on equal enforcement

[11] S.I. Strong, Use and Perception of International Commercial Mediation and Conciliation: A Preliminary Report on Issues Relating to the Proposed UNCITRAL Convention on International Commercial Mediation and Conciliation, at 27-28 (University of Missouri School of Law Legal Studies Research Paper No. 2014-28, Nov. 17, 2014) [hereinafter Strong, Use and Perception of International Commercial Mediation and Conciliation: A Preliminary Report]; see also Bruno Zeller & Leon Trakman, Mediation and Arbitration: The Process of Enforcement, 24 UNIF. L. REV. 449, 465 (2019) (quoting New South Wales Chief Justice James Spigelman ("Arbitration is no longer fulfilling the basic need of business customers for early and effective resolution of disputes. We are increasingly turning elsewhere, to mediation and other forms of ADR.")).

[12] Strong, *Use and Perception of International Commercial Mediation and Conciliation: A Preliminary Report*, *supra* note 16, at 24. Additionally, the renaissance of mediation can be tied to that of ADR generally. *See* Haris Meidanis, *International Enforcement of Mediated Settlement Agreements: Two and a Half Models–Why and How to Enforce Internationally Mediated Settlement Agreements*, 85 ARB. 49, 51 (2019) ("[I]n its core, the ADR renaissance is an expression of the crisis of the nation state in the post-modern era. The state monopoly is clearly questioned, also in the field of dispute resolution and this gradually gives mediation an all the more important role.").

[13] See Christina G. Hioureas, The Singapore Convention on International Settlement Agreements Resulting from Mediation: A New Way Forward?, 37 BERKELEY J. INT'L L. 215, 215-16 (2019).

[14] Timothy Schnabel, The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements, 19 PEPP. DISP. RESOL. L.J. 1, 3 (2019) [hereinafter Schnabel, The Singapore Convention]; see also Strong, Use and Perception

footing with arbitral awards and thereby encourage resort to mediation in a transnational context, the US' representatives to the United Nations Commission on International Trade Law (UNCITRAL) Working Group II (UNCITRAL Working Group) proposed the development of a multilateral convention for mediated settlement enforcement in 2014.[15] "[P]roponents of developing the Convention expressed a hope that it will be able to give mediation the same type of boost that arbitration received from the New York Convention."[16]

Acting on the US Proposal, the UNCITRAL Working Group spent six sessions developing the Singapore Convention.[17] In December 2018, the UN adopted the Convention's final text, which was opened for signature in August of the following

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of International Commercial Mediation and Conciliation: A Preliminary Report, supra note 16, at 43-44 ("For example, 9% of the respondents indicated that it would be impossible or very difficult to enforce an agreement to mediate or conciliate an international commercial dispute in the respondent's home jurisdiction. Approximately 28% of respondents indicated that enforcement would be somewhat difficult, while only 35% of the respondents thought that it would be easy to enforce a settlement agreement arising out of an international commercial mediation or conciliation seated in their home jurisdiction. Approximately 17% of the respondents indicated the issue was largely untested in their home jurisdiction, and 11% did not know how the matter would be resolved under domestic law."). This accords with the results of a 2007 survey conducted by the by the International Bar Association's Mediation Committee. See IBA Mediation Committee, Sub-Committee on the UNCITRAL Model Law on International Commercial Conciliation (Oct. 2007), available at https://www.ibanet.org/ENews_Archive/IBA_November_2007_ENews_MediationSummary.asp.

[15] UNCITRAL, Proposal by the Government of the United States of America: future work for Working Group II, at 2, 4, U.N. Doc. A/CN.9/822 (2014) [hereinafter 2014 US Proposal].

[16] Schnabel, *The Singapore Convention*, *supra* note 19, at 3. Note, however, that the data relied on by these proponents also pointed to other obstacles to relying on mediation, such as a lack of education. Strong, *Use and Perception of International Commercial Mediation and Conciliation: A Preliminary Report*, *supra* note 16, at 31. Moreover, a comprehensive study of the EU Directive's failure to promote use of mediation in the EU questioned the very premise of the boost-through-enforcement rationale, noting that "[e]ven where the domestic processes to enforce mediated settlements are deemed to be relatively easy, therefore dispelling the concern that litigants might not engage in mediation out of fear that enforcing its result might be too cumbersome, the number of mediations is low." European Parliament, Directorate-General for Internal Policies, "*Rebooting*" *the Mediation Directive*: *Assessing the Limited Impact of its Implementation and Proposing Measures to Increase the Number of Mediations in the EU*, at 163 (Jan. 2014), https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL-JURI_ET(2014)493042.

[17] Schnabel, *The Singapore Convention*, *supra* note 19, at 5-7.

year. As of January 2021, 52 countries had signed the Convention and six had ratified it. This means that the Convention, which requires a minimum of three such ratifications, has now entered into force.[18]

## III. BROAD AND UNTESTED NON-ENFORCEMENT GROUNDS

According to a member of the US delegation, the Convention was designed not as a tool to "provide enforceability for settlement agreements that otherwise would not have been enforceable at all, but rather to provide a framework for enforcement . . . that would be more efficient than litigation under contract law."[19] Thus, the instrument attempts to "convert what would otherwise be seen as purely a private contractual act into an instrument that can circulate under a legally-binding international framework, and provide an entitlement to privileged treatment in other states, similar to a judgment."[20] In particular, the Convention seeks to "eliminate the need for a court to address all but a few enumerated defenses relating to the mediation process and the subject of the settlement."[21]

Seeking to achieve these goals, Article 5 of the Singapore Convention, which borrows from Article V of the New York Convention, provides limited grounds for non-enforcement:

> 1. The competent authority of the Party to the Convention where relief is sought under article 4 may refuse to grant relief at the request of the party against whom the relief is sought only if that party furnishes to the competent authority proof that:
>
> (a) A party to the settlement agreement was under some incapacity;

[18] For an outline of the steps required to ratify the Convention in the United States, and a discussion of how delays in the United States' ratification of the Convention may delay any momentum for its adoption elsewhere, *see* Timothy Schnabel, *Implementation of the Singapore Convention: Federalism, Self-Execution, and Private Law Treaties*, 30 AM. REV. INT'L ARB. 265 (2020) [hereinafter Schnabel, *Implementation of the Singapore Convention*].

[19] Schnabel, *The Singapore Convention*, *supra* note 19, at 4.

[20] *Id.* at 11.

[21] Gilbert Samberg, *The Future of Int'l Mediation After the Singapore Convention*, LAW 360 (Aug. 2010), https://www.law360.com/articles/1191759/the-future-of-int-l-mediation-after-the-singapore-convention.

> (b) The settlement agreement sought to be relied upon:
>
> (i) Is null and void, inoperative or incapable of being performed under the law to which the parties have validly subjected it or, failing any indication thereon, under the law deemed applicable by the competent authority of the Party to the Convention where relief is sought under article 4;
>
> (ii) Is not binding, or is not final, according to its terms;
>
> or
>
> (iii) Has been subsequently modified;
>
> (c) The obligations in the settlement agreement:
>
> (i) Have been performed; or
>
> (ii) Are not clear or comprehensible;
>
> (d) Granting relief would be contrary to the terms of the settlement agreement;
>
> (e) There was a serious breach by the mediator of standards applicable to the mediator or the mediation without which breach that party would not have entered into the settlement agreement; or
>
> (f) There was a failure by the mediator to disclose to the parties circumstances that raise justifiable doubts as to the mediator's impartiality or independence and such failure to disclose had a material impact or undue influence on a party without which failure that party would not have entered into the settlement agreement.
>
> 2. The competent authority of the Party to the Convention where relief is sought under article 4 may also refuse to grant relief if it finds that:
>
> (a) Granting relief would be contrary to the public policy of that Party; or
>
> (b) The subject matter of the dispute is not capable of settlement by mediation under the law of that Party.

These defenses were formulated by the UNCITRAL Working Group to be limited, exhaustive, stated in general terms, and not cumbersome to implement, while affording "flexibility to the enforcing authority with regard to their interpretation."[22] Moreover, as with Article V of New York Convention, these grounds "are permissive rather than mandatory; a court can choose to provide relief [*i.e.*, enforce an

[22] UNCITRAL, Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-third session, at 17, U.N. Doc. A/CN.9/861 (Sept. 17, 2015).

agreement] even if a particular exception might apply, and if a state implements the Convention through legislation, it has no obligation to permit courts to use all grounds for refusal."[23]

But drafters' intentions and commentators' characterizations aside, Article 5's untested language appears to provide ample opportunities to obstruct the enforcement of a mediated settlement. In principle, the Singapore Convention's aim is that "a breached qualifying settlement agreement should be enforced according to its terms more or less summarily by the national courts of a convention country, rather than being considered merely the basis for a plenary proceeding for breach of contract."[24] Notably, however, there is substantial overlap between the enumerated grounds for countering enforcement and common contract law defenses—including incapacity (Article 5(1)(a)), inability of performance (Article 5(1)(b)(i)), lack of finality and subsequent modification (Article 5(1)(b)(ii)-(iii)), completed performance (Article 5(1)(c)(i)), and incomprehensibility (Article 5(1)(c)(ii)).[25] In fact, rather than build on the New York Convention's narrow grounds for non-enforcement, the Singapore Convention introduces uncertainties at many levels, for instance, omitting from Article 5(1)(a)—concerning incapacity—the phrase "under the law applicable to them" included in the New York Convention. Similarly, the Singapore Convention's failure to provide criteria for fixing the governing law leaves it to any competent enforcement court to select the body of law that best suits its purposes.

Thus, it appears doubtful that parties to a mediated settlement agreement subject to enforcement under the Singapore Convention will be better off than they are now when measured against the apparent goal of "obliging governments to recognize the legal status of any mediated settlement," and thereby "mitigat[ing] risk when entering into a commercial relationship with businesses in foreign markets."[26] By way of

[23] Schnabel, *The Singapore Convention*, *supra* note 19, at 42.

[24] Samberg, *supra* note 26.

[25] *See generally*¸ Nadja Alexander & Shoyu Chong, *Article 5(1)(a)-(d). Contract-Related Grounds for Refusal*, in THE SINGAPORE CONVENTION ON MEDIATION: A COMMENTARY 87 2019).

[26] *Cf.* Letter from Coalition of Service Industries, National Association of Manufacturers, National Foreign Trade Council, U.S. Chamber of Commerce, and United States Council for

example, in the US, courts have adopted a sweeping policy in favor of enforcing negotiated settlements, leading to such agreements being treated as "super contracts" with courts frequently reluctant to refuse enforcement, particularly in commercial disputes where sophisticated parties have been advised by competent legal counsel.[27] As for international mediated settlement agreements, certain US states (such as California and Texas) have statutes in place that subject international mediated settlements to enforcement as international arbitral awards.[28] In contrast, generally speaking, a party seeking or resisting enforcement under the Singapore Convention navigates uncharted waters.

## IV. NO SET-ASIDE MECHANISM UNDER THE SINGAPORE CONVENTION

Whereas Article 5's broad language has been the subject of some critical commentary,[29] to date the nascent literature on the Singapore Convention has largely glossed over a major distinction between the Singapore Convention and the New

International Business, to Secretary of State Michael R. Pompeo, Nov. 6, 2018, available at https://www.uscib.org/uscib-content/uploads/2018/11/Coalition_SignaporeConvention onMediation_11.6.18.pdf.

[27] *See* Edna Sussman & Conna Weiner, *Striving for the 'Bullet-Proof' Mediation Settlement Agreement*, 8 N.Y. DISP. RESOL. L. 22, 22 (2015).

[28] 2014 US Proposal, *supra* note 20, at 4 (citing Cal. Civ. Pro. § 1297.401; Tex. Civ. Prac. & Rem. Code Ann. § 172.211). Note also that some institutions have sought to ensure direct cross-border enforceability of mediated settlement agreements by combining mediation with features of arbitration. Such processes include "Arb Med-Arb" (as developed by the Singapore International Mediation Centre) and "Med Arb" (as is common in China and some other Asian jurisdictions, including Japan). In these processes, the parties attempt to settle their dispute through mediation and, if successful, have an arbitral tribunal record the mediated settlement agreement as a consent award enforceable under the New York Convention. Despite meeting this objective, Arb-Med-Arb and Med-Arb processes are seldom used in cross-border disputes, possibly due to the cost and inefficiency of requiring both a mediator and an arbitrator. Craig Celniker et al., *Newly Signed Singapore Convention to Make International Settlement Agreements Directly Enforceable in Convention States*, JDSUPRA (Apr. 15, 2019), https://www.jdsupra.com/legalnews/newly-signed-singapore-convention-to-31516.

[29] Refer to Fletcher, *supra* note 5, at 9678-79, for a discussion of how the Singapore Convention is not a fix-all, especially in situations where settlement agreements do not result in "straightforward monetary payments in exchange for the waiver of claims," but are rather "complex new arrangements to govern future commercial relations," which may require a determination of facts. To this end, Fletcher advises parties to seek local advice "prior to entering any mediation settlement to which the Convention may apply." *Id.*

York Convention: the Singapore Convention's lack of a set-aside mechanism[30] or what has been described in a different context as "a treaty-based solution for limiting the ground of refusal of enforcement that the [mediated settlement agreement] has been set aside in the country of origin."[31] This was a deliberate choice by the UNCITRAL Working Group.[32] As a member of the US delegation reasoned:

> [I]n arbitration, the disputing parties consent only to the process for resolving their dispute, but not to the ultimate outcome, yet the agreement to arbitrate and the arbitral award—which otherwise would only be private acts governed by contract law—are given privileged status under the New York Convention. In mediation, by contrast, the parties have agreed to not only the process for resolving their dispute but also to the ultimate outcome—thus suggesting a far stronger justification for according a privileged status to the mediated

[30] There is some limited commentary. For instance, one blog post notes: "Unlike the EU Mediation Directive, the Singapore Convention on Mediation emphasizes only the stage of enforcement and dispenses with the initial control at the country where the settlement agreement is reached. In other words, the Convention allows the enforcing party to directly enforce the settlement agreement in the courts, or by any other competent authority, of the country where the assets are located. This elevates an otherwise purely private contractual act to a sui generis status, which is comparable to the status of arbitral awards[.]" Hassan Faraj Mehrabi & Hosna Sheikhattar, *The Singapore Mediation Convention: A Promising Start, an Uncertain Future*, LEIDEN L. BLOG (Sept. 5, 2019). Others have glossed over the distinction, however: "It is true that the arbitrators make an award that is, by itself, enforceable upon the parties, whereas parties to mediation reach an enforceable agreement. However, the distinction between the legal effect at the seat of arbitration and at the place where the award is enforced is also applicable to the enforcement of mediation agreements. In this respect, the process of enforcing arbitration awards and mediation agreement are comparable." Zeller & Trakman, *supra* note 16, at 459.

[31] Albert Jan van der Berg, Should the Setting Aside of the Arbitral Award be Abolished?, 29 ICSID REV. 263, 274 (2014).

[32] *See* Schnabel, *The Singapore Convention*, *supra* note 19, at 43. Note, however, that at least in the early deliberations in 2015, the UNCITRAL Working Group contemplated adopting provisions paralleling Article V(1)(e): "[I]t was widely felt that the instrument would need to indicate the possible impact that other related judicial or arbitral proceedings could have on the enforcement procedure. . . . It was suggested that the approach adopted in article V(1)(e) and VI of the New York Convention could provide useful guidance. For instance, the instrument might provide that the enforcing authority might, if it considers proper, adjourn its decision on the enforcement of the settlement agreement when there exists an application for a judicial or arbitral proceedings about the settlement agreement. UNCITRAL, Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-third session, at 15, U.N. Doc. A/CN.9/861 (2015).

> settlement agreement.[33]

Beyond this attempt to make out qualitative distinctions between settlements and arbitral awards, the Singapore Convention's marked departure from the New York Convention on the set-aside issue deserves careful scrutiny. To illustrate, suppose that after the Singapore Convention enters into force, a Chinese corporation and a Delaware corporation enter into a mediated settlement agreement governed by New York law and executed in Singapore. The Delaware corporation later fails to abide by the terms of the mediated settlement. The Chinese corporation brings an enforcement action in Delaware, but the court refuses enforcement on an Article 5 ground of the Singapore Convention. However, the Delaware corporation has assets in some three dozen countries–twenty-six of which have ratified the Singapore Convention. Over the ensuing years, the Chinese corporation brings lawsuit after lawsuit against the Delaware corporation in an effort to enforce the terms of the settlement agreement. Though courts in many of the jurisdictions side with the Delaware corporation, the Delaware corporation's board concludes that the outstanding amount pales in comparison with the legal fees associated with continually fighting enforcement actions across the globe and instructs its counsel to pay any remaining monies due under the settlement agreement despite abundant Article 5 grounds for not enforcing that settlement.[34]

Of course, "award-debtors frequently comply voluntarily with international arbitral awards made against them,"[35] and as some have suggested, "[i]deally, the [Singapore] Convention will rarely need to be invoked in court, as in most cases, parties will abide by the mediated settlement they conclude."[36] Yet enforcement mechanisms do exist for a reason. As one commentator notes:

> Some people may believe that enforcement of settlement

[33] Schnabel, *The Singapore Convention*, *supra* note 19, at 11 (emphasis added).

[34] *Cf.* Philipe Hovaguimian, *The Res Judicata Effects of Foreign Judgments in Post-Award Proceedings: To Bind or not to Bind?*, 34 J. INT'L ARB. 79, 96 (2017) (noting with respect to international arbitrations that "[e]nforcement is often sought simultaneously in multiple jurisdictions, and the award-debtor's resources may become accordingly limited").

[35] Gary B. Born, International Commercial Arbitration 3164 (2nd ed. 2014).

[36] Schnabel, *The Singapore Convention*, *supra* note 19, at 4.

> agreement should not be a primary concern in an international instrument of this type, since mediation is a consensual dispute resolution mechanism that would likely lead to the parties' living up to their agreements voluntarily. However, parties do in fact fail to live up to their agreed obligations, which suggests that enforcement mechanisms are needed.[37]

There are myriad reasons that may cause a party to retreat from a mediated settlement agreement, including: buyer's remorse; a change in company management or ownership; disagreement over a material term; external factors, such as currency fluctuations, government action, natural events, negative publicity, etc.[38] Indeed, judging by sixty years of experience with the New York Convention, "there are circumstances in which a party concludes, either for tactical reasons or because of a genuinely-held sense of injustice, that an award against it is fundamentally wrong."[39] Notably, this outcome may be more likely "when the settlement agreement relied upon will be devoid of the comfort of reasoning by an accepted and recognized qualified arbitrator as one would [tend to] find with an award."[40]

Under the New York Convention, as generally implemented, parties could seek to annul or set aside the award against them at the arbitral seat, and that set-aside then may be relied upon as an explicit ground for non-enforcement in other jurisdictions. As detailed below, however, that degree of procedural certainty is not woven into the fabric of the Singapore Convention. As noted by one commentator, "If the buck does not stop at the primary jurisdiction, it may not stop anywhere."[41]

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[37] S.I. Strong, *Beyond International Commercial Arbitration—The Promise of International Commercial Mediation*, 45 WASH. U.J.L. & POL'Y 10, 35 (2014) [hereinafter Strong, *Beyond International Arbitration*] (citing Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 376-77 (1994); Margaret Graham Tebo, *A Learning Experience*, 27 ABA J. E-REPORT 2 (2006) (discussing case where the American Bar Association failed to live up to the terms of a consent decree)).

[38] Edna Sussman, *The Final Step: Issues in Enforcing the Mediation Settlement Agreement*, 2 THE FORDHAM PAPERS 343, 3-4 (Arthur W. Rovine ed., 2008).

[39] BORN, *supra* note 40, at 3164.

[40] Craig Carter, Singapore Convention 2018: Reshaping Alternate Dispute Resolution and Enforcement, 48 L. SOC'Y J. 84, 85 (2018).

[41] W. Michael Reisman, Systems of Control in International Adjudication and Arbitration: Breakdown and Repair 118 (1992).

A. *Set-Aside Under the New York Convention and Set-Aside's Omission from the Singapore Convention*

As under the Geneva Convention of 1927,[42] the New York Convention's "only limits on the annulment authority of the arbitral seat are implied (and . . . disputed); even if accepted, these limits leave the subject of annulment primarily to local law in the arbitral seat. Nonetheless, . . . most national arbitration regimes have adopted broadly similar approaches to the available grounds for annulment of international arbitral awards. In most states, the grounds for annulment are limited to bases paralleling those applicable to non-recognition of awards in Article V of the New York Convention."[43] This parallelism has been attributed to the popularity of the 1985 UNCITRAL Model Law, which has been implemented in 80 countries, and whose grounds for set-aside parallel those of the New York Convention.[44] Among the non-enforcement grounds, under Article V(1)(e) of the New York Convention:

> Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: . . . (e) The award . . . has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.[45]

Thus, if an award has been set aside at the seat of the arbitration, courts in other jurisdictions will—in all likelihood[46]—consider that set-aside itself a ground for non-

[42] Convention on the Execution of Foreign Arbitral Awards, July 25, 1929, 92 U.N.T.S. 301 [hereinafter Geneva Convention].

[43] BORN, *supra* note 40, at 3391.

[44] Van den Berg, *supra* note 36, at 266.

[45] New York Convention art. V(1)(e) (emphasis added).

[46] BORN, *supra* note 40, at 3391 (citing UNCITRAL Model Law on International Commercial Arbitration, 1985, art. 36(1)(a)(v) ("[T]he award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, under the law of which, that award was made[.]"); English Arbitration Act 1996, c. 23, § 103(2)(f) (providing that recognition "may be refused it the person against whom it is invoked proves . . . that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made"); ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], § 1061, para. 3, *translation at* https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html (Ger.) (providing that "[w]here the arbitration award is reversed abroad, after having been declared

recognition and non-enforcement.[47]

It is through the seat-of-the-arbitration concept, and the explicit recognition of that forum as the appropriate place to challenge an award, that the New York Convention provides a degree of enforcement predictability—including effective recourse—to those involved in the arbitral proceeding.[48] The Singapore Convention, in contrast, does not follow the lead of the New York Convention with respect to set-aside and instead omits any analog to Article V(1)(e). One proponent of eschewing the seat concept for challenges wrote:

> The model of the Singapore Mediation Convention essentially delocalizes from the enforcement process the place where the [mediated settlement agreement] may have been reached. This is done by allowing enforcement in the country of choice of the enforcing party. This has the extra value that it can be of use to the existing and increasing electronic mediation proceedings and the freedom that parties in mediation expect to have, so as to design solutions not tied to a specific legal system. This simple mechanism is, to our mind, a recognition of the following givens: (a) a situs of mediation is irrelevant, or at least not as relevant, contrarily to the situs of litigation or arbitration; (b) the MSA does not need to produce a res judicata or have enforcing power in the country where it has been concluded in order for it to be enforced internationally. This also exerts substantial influence on the enforcement

enforceable, a petition may be filed that the declaration of enforceability be repealed").

[47] *See*, *e.g.*, Van den Berg, *supra* note 36, at 277 ("I have to warn you that . . . reliance on the verb 'may' [in Article V(1)(e) of the New York Convention] is a view expounded by some scholars. But, to my knowledge, there is not a single court that has used a discretionary power under Article V(1) of the Convention, granting enforcement of an award set aside in the country of origin."); *but see* BORN, *supra* note 40, at 3391 ("[E]ven if an award is annulled in the place of arbitration, courts in other jurisdictions may nonetheless choose to recognize and enforce the award. . . . [T]his is particularly true where the award has been annulled on grounds of local public policy and/or nonarbitrability, or because local law permits review of the merits of the arbitral tribunal's decision.").

[48] For sake of historical perspective, it should be noted that the Geneva Convention, the New York Convention's predecessor, had rendered enforcement overly burdensome by making recognition at the seat of arbitration a prerequisite to any enforcement elsewhere—so-called double exequatur. *See* Geneva Convention art. 1(d) ("To obtain . . . recognition or enforcement, it shall, further, be necessary: . . . (d) That the award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to opposition, *appel*, *or pourvoi en cassation* (in the countries where such forms of procedure exist) or if it is proved that any proceedings for the purpose of contesting the validity of the award are pending.").

> process: one can try direct enforcement in any country, irrespective of the country where the MSA may have been reached. Actually, the [UNCITRAL] Working Group discussed the matter in detail prior to agreeing on the direct enforcement model. The basic idea is that given the nature of mediation, the difficulty in localizing the emanating state of the MSA and in order to avoid a double exequatur [as under Geneva Convention] process that this would entail, direct enforcement would be the suitable model for MSAs.[49]

This assessment perhaps reflects that "[s]etting aside seems to have become the bête noire of international arbitration."[50] But from a practical point of view, the arguments advanced make little sense. They are a prescription for a seemingly endless opportunity to litigate the validity and enforceability of a mediated settlement agreement in one jurisdiction after another.

B. *"Delocalized" Dispute Resolution*

While it may be fair to suppose that mediations between parties from multiple countries will be, and perhaps already are, conducted by virtual communication methods,[51] that is no reason to "delocalize" the mediation so that it is stateless, *i.e.*, that there is or cannot be a situs. The rationale offered by the UNCITRAL Working Group—that identifying a particular state of origin for a mediated settlement would be too difficult—appears more result-oriented than compelled by circumstances. And the argument by a member of the US delegation offered to buttress the delocalization approach—that "the mediation process [does not] itself necessitate the identification of a seat[52]—offers little more persuasive reasoning. The same applies to the following hypothetical:

> Party 1 is a Canadian company represented by its general counsel, who participates remotely in the mediation while on vacation in Israel; Party 2 is a Mexican company represented by its general counsel, who participates in the mediation while on a business trip to Singapore; the mediator is Danish

[49] Meidanis, *supra* note 17, at 53-54.

[50] For a rejection of this assessment, refer to Van den Berg, *supra* note 36, at 271.

[51] For instance, JAMS offers an online mediation product called "Endispute", albeit only for claims of US$100,000 or less. *Endispute Online Dispute Resolution*, JAMS, https://www.jamsadr.com/endispute.

[52] Schnabel, *The Singapore Convention*, *supra* note 19, at 13-14.

> professor currently living in (and participating from) Texas; the online mediation is administered by an Australian institution; and the resulting settlement, which resolves a dispute over a contract governed by Swiss law, provides that it is governed by Dutch law for some issues and German law for other issues.[53]

The situs of the mediation, according to the hypothetical, "would be neither obvious nor important."[54] Yet, the logic underpinning that conclusion is far from inescapable. After all, like arbitration, mediation is a creature of contract, meaning that even if the mediation does not take place in one physical location, mediating parties could, and probably should for the sake of predictability, specify a particular jurisdiction whose law is to govern the settlement agreement.[55] In so doing, they would come within the situs selection ambit of the New York Convention's time-tested language. What is more, private international law has long grappled with and established its ability to tackle conflict-of-laws and choice-of-law questions. Thus, the notion that delocalized mediations cannot or need not have a situs, or that it would escape any straightforward definition, is misguided.

C. *Direct Enforcement Without Effective Recourse*

Under the Singapore Convention as signed, a mediated settlement agreement "does not need to produce a *res judicata* or have enforcing power in the country where it has been concluded in order for it to be enforced internationally."[56] A party to a mediated settlement agreement could seek enforcement in any jurisdiction that has ratified the Convention without the need for confirmation at the arbitral seat. This, as noted above,[57] is no different from the New York Convention:

> The [UNCITRAL] Working Group wanted to avoid replicating the problems that arbitration faced prior to the New York Convention—i.e., the Geneva Convention approach that required double exequatur for arbitral awards—due to the fear of creating a system that would be so burdensome that parties

[53] Schnabel, Implementation of the Singapore Convention, supra note 23, at 267 n. 10.

[54] Id.

[55] There is more scholarship on conflict-of-laws and choice-of-law principles governing contracts than will fit into a footnote—and going back at least a century. *See*, *e.g.*, Joseph Beale, WHAT LAW GOVERNS THE VALIDITY OF A CONTRACT, 23 HARV. L. REV. 79 (1909).

[56] Meidanis, *supra* note 17, at 53-54.

[57] *See supra* note 54.

> would not want to use it.[58]

Conversely, the lack of any situs or any one jurisdiction considered per the Singapore Convention to have the authority to set aside a mediated settlement agreement is a departure from the New York Convention. And in that sense, bringing a mediation within the ambit of the Singapore Convention may do nothing more than become an invitation for a party to launch a forum shopping to enforce the mediated settlement. That in itself should give pause to any party whose mediated agreement is subject to the Convention.

As has been argued in the international arbitral context, "[i]t is axiomatic that there should be supervision over international arbitration, be it private law arbitration, investment arbitration or public arbitration."[59] Professor Albert Jan van den Berg explained in 1981 (and reiterated in 2014):

> [A]n elimination of the ground for refusal that the award has been set aside in the country of origin would, in my opinion, be undesirable. A losing party must be afforded the right to have the validity of the award finally adjudicated in one jurisdiction. If that were not the case, in the event of a questionable award a losing party could be pursued by a claimant with enforcement actions from country to country until a court is found, if any, which grants enforcement. A claimant would obviously refrain from doing this if the award has been set aside in the country of origin and this is a ground for refusal of enforcement in other Contracting States.[60]

Professor Van den Berg's observations are no less applicable to a mediated settlement: there is considerable value in recognizing and addressing the need for finality. As Lord Simon of Glaisdale put it in a related context, "Since judges are fallible human beings, we have provided appellate courts which do their own fallible best to correct errors. But in the end you must accept what has been decided. Enough is Enough. And the law echoes: *res judicata*, the matter is adjudged."[61]

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[58] Schnabel, *The Singapore Convention*, *supra* note 19, at 13.

[59] Van den Berg, *supra* note 36, at 283.

[60] Albert Jan van den Berg, The New York Arbitration Convention of 1958: Towards A Uniform Judicial Interpretation 355 (1981); *see also* Van den Berg, *supra* note 36, at 285-86.

[61] The Ampthill Peerage Case [1977] A.C. 547 (HL) 575-76 (UK).

With set-asides as in other areas of the law, "the finality of decisions is fundamental in any legal system as it ensures fairness, efficiency, certainty and predictability in the dispute resolution process."[62] Without a designated forum or institution to consider set-aside applications,[63] the Singapore Convention lacks a feature that would give parties to mediated settlement agreements under the Convention the assurance that setting aside a defective settlement can be accomplished by means more effective than an across-the-globe litigation expedition.

Put another way, one should ask whether a reasonably well-informed prospective party to a mediated settlement agreement would buy into the following proposition: The agreement will be directly enforceable in any Singapore Convention jurisdiction, and the only mode of resisting enforcement will be to oppose proceedings in every single jurisdiction where a party seeks enforcement. At the very least, this will cause some head-scratching; more likely, it will engender the pursuit of alternatives.

D. *Local Invalidation*

Some have argued that the lack of set-aside is not as impactful as just outlined. Direct enforcement would not deprive courts at the originating state to review the validity of the settlement agreement nor would it necessarily mean that courts in jurisdictions asked to enforce the agreement would ignore principles of international comity and turn a blind eye towards the decision of the court in the originating state.[64]

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[62] Silja Schaffstein, The Doctrine of Res Judicata Before International Commercial Arbitral Tribunals 2 (2016).

[63] *See*, *e.g.*, Van den Berg, *supra* note 36, at 286 ("If we really want to improve the current situation [in international arbitration], States should transfer control over an international arbitral award to an independent international body. The body would have the exclusive jurisdiction to set aside an arbitral award. Enforcement of the award would be automatic in all countries.").

[64] Meidanis, *supra* note 17, at 53-54 (noting that the Singapore Convention "would not deprive courts in the originating state [of] the competency to review the validity of the settlement agreement, but would not go so far as to accept even a limited review prior to direct enforcement, such limited review to be left to the enforcing state"); *see also* UNCITRAL, Report of Working Group II (Arbitration and Conciliation) on the work of its sixty-third session, at 15, U.N. Doc. A/CN.9/861 (2015) ("It was . . . mentioned that direct enforcement would not deprive

All of that is true, but there is little by way of assurance on the face of the Singapore Convention that invalidation in the "originating state" would have preclusive effect on enforcement in other jurisdictions.

Article 5(1)(b) provides for non-enforcement where:

> The settlement agreement sought to be relied upon: Is null and void, inoperative or incapable of being performed under the law to which the parties have validly subjected it or, failing any indication thereon, under the law deemed applicable by the competent authority of the Party to the Convention where relief is sought.

Yet, there is no indication that a competent authority's decision in the originating jurisdiction would have any preclusive effect elsewhere. What is more, the *travaux préparatoires*, which are explicit in rejecting a forum for set-aside applications, would arm those searching for a favorable jurisdiction (after losses elsewhere) with an argument that every court should approach the application de novo.[65]

E. *Lis Pendens—a Viable Alternative to Set-Aside?*

The principle of *lis pendens*, incorporated in Article 6 of the Singapore Convention (and a verbatim copy of the New York Convention), provides at least partial relief:

> If an application or a claim relating to a settlement agreement has been made to a court, arbitral tribunal or any other competent authority which may affect the relief being sought under article 4, the competent authority of the Party to the Convention where such relief is sought may, if it considers it proper adjourn the decision and may also, on the request of a party, order the other party to give suitable security.

"The provision applies to both when enforcement of a settlement agreement is sought and when a settlement agreement is invoked as a defense."[66]

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courts at the originating state to review the validity of the settlement agreement.").

[65] *See* UNCITRAL, Report of Working Group II (Dispute Settlement) on the work of its sixty-fifth session, at 21, U.N. Doc. A/CN.9/896 (2016) ("While it was suggested that the instrument could provide that the enforcing authority might refuse enforcement if it found that the enforcement would be contrary to a decision of another court or competent authority, it was generally felt that there was no need to include such a defence, as it would inadvertently complicate the enforcement procedure, invite forum shopping by parties and would generally be covered through the defences already provided in [Article 5].").

[66] Edna Sussman, The Singapore Convention—Promoting the Enforcement and Recognition of International Mediated Settlement Agreements, 3 ICC DISP. RESOL. BULL. 42, 52 (2018).

As such, courts in their discretion may suspend proceedings concerning the enforcement of a settlement agreement based on parallel or related proceedings elsewhere. This could help reduce potential inefficiencies associated with parallel proceedings in multiple jurisdictions. *Lis pendens*, however, is no substitute for set-aside. First, it is discretionary, leaving competent authorities to decide whether to grant a suspension. Second, it does not affect the ultimate right to enforcement in other jurisdictions, so in the best case that authority will suspend proceedings pending the outcome of another case; but such competent authorities could also split on that question with only some deciding to stay proceedings. All things being equal, *lis pendens* may only work to prolong the dispute, for even if a jurisdiction waits for the outcome of a parallel proceeding, a non-enforcement decision would have no assured preclusive effect elsewhere.

F. *Res Judicata*

Relatedly, outside of the Convention, a non-enforcement decision in one jurisdiction could be given effect in another jurisdiction under *res judicata* principles of domestic or customary international or treaty law.

For instance, in the European Union, the Brussels Convention on jurisdiction and the enforcement of judgements in civil and commercial matters[67] seeks to avoid irreconcilable judgments in the courts of its member states.[68] According to the Committee of Experts' Report, "There can be no doubt that the rule of law in a State would be disturbed if it were possible to take advantage of two conflicting judgments."[69] The European Court of Justice defines that term broadly to encompass "any judgment given by a court or tribunal of a Contracting State, whatever the judgment may be called, including decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court."[70]

[67] Regulation (EU) 1215/2012, 2012 O.J. (L 351) 1.

[68] *See* SCHAFFSTEIN, *supra* note 67, at 62.

[69] P. Jenard, Report on the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1979 O.J. (C 59) 1, 45.

[70] Case C-414/92, Solo Kleinmotoren GmbH v. Emilio Bloch, 1994 E.C.R. I-02237.

Indeed, civil and common law jurisdictions alike recognize *res judicata* as to foreign judgments.[71] Some scholars even refer to *res judicata* as a rule of customary international law.[72] But the scope and effect of the doctrine vary across jurisdictions.[73] In the US, for instance, "[t]here is presently no federal standard governing the enforcement by U.S. courts of judgments rendered by foreign courts," and "the United States has made few attempts to conclude treaties with other countries on the reciprocal recognition and enforcement of judgments, and when it has, those attempts have failed."[74] That being said, under principles of common law and statutes, "there are surprisingly few fundamental differences in the approaches taken by the various [U.S.] states."[75]

The arguably broad recognition of *res judicata* principles aside, the doctrine is no replacement for a definitive forum selection for consideration of set-aside applications. Even if in individual cases an end may be put to litigation in some jurisdictions on *res judicata* grounds,[76] this is a far cry from the certainty that would come from a well-defined mechanism through inclusion of an express non-enforcement ground for set-aside. What is more, there is a plausible argument that the Singapore Convention's signatories, by excluding such a non-enforcement ground, sought to eliminate any *res judicata* effect for enforcement litigation arising

[71] *See generally* SCHAFFSTEIN, *supra* note 67, at 15-59.

[72] *See*, *e.g.*, YUVAL SHANY, THE COMPETING JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS 246 (2003); *see also* Filip de Ly & Audley Sheppard, *ILA Interim Report on Res Judicata and Arbitration*, 25 ARB. INT'L 35, 36 (2004) (referring to *res judicata* as a general principle of law).

[73] *See generally* SCHAFFSTEIN, *supra* note 67, at 15-59.

[74] Gary B. Born & Peter B. Rutledge, International Civil Litigation in United States Courts 1069-70 (6th ed. 2018).

[75] *Id.* at 1071 (noting that "most state courts have adopted the basic approach to foreign judgments taken almost a century ago in *Hilton v. Guyot*," 159 U.S. 113 (1985)).

[76] *See*, *e.g.*, V Cars, LLC v. Chery Auto. Co., 603 F. App'x 453, 458 (6th Cir. 2015) ("The arbitration proceedings in Hong Kong provided V Cars with the opportunity to raise all of the RICO claims available to it. Because the arbitral tribunal had jurisdiction over the claims, because the arbitrators issued a final decision on the merits of the claims, and because the arbitration proceedings and the federal court proceedings involved the same parties and the same causes of action, principles of *res judicata* preclude V Cars from pursuing their RICO claims in another forum.").

from mediated settlement agreements.[77] In other words, principles of *res judicata* may afford little respite.

G. *Contractual Set-Aside*

To be sure, parties could provide for a set-aside mechanism in the settlement agreement itself. After all, Singapore Convention Article 5(1)(d), without parallel in the New York Convention,[78] states unequivocally that enforcement may be refused where "[g]ranting relief would be contrary to the terms of the settlement agreement." As a member of the U.S. delegation confirmed:

> [I]f the parties agree to limitations on their ability to seek relief, those limitations must be given effect. Choice of forum clauses under which the parties to the mediated settlement can only seek relief in a particular jurisdiction should be given effect, as should clauses in the mediated settlement providing that further disputes will be resolved by arbitration.[79]

But leaving set-aside to a negotiated term may pose a Hobson's choice—do parties expend negotiating capital on a term that may prove controversial and whose utility to any one party will only emerge with the benefit of hindsight, thereby endangering the achievement of a substantively favorable settlement? Further, judicial appetite to enforce a clause prescribing a set-aside mechanism is untested and may vary from one jurisdiction to another.[80] In short, the contractual workaround itself lacks

[77] Vienna Convention on the Law of Treaties art. 31(10), May 23, 1969, 1155 U.N.T.S. 331 ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."). A possible textual hook for parties seeking a *res judicata* effect of a non-enforcement decision in other jurisdictions could rely on Singapore Convention Article 5(2)'s exception for public policy or not being "capable of settlement by mediation under the law of that Party."

[78] Chua, *supra* note 14, at 201 (noting, without explaining why the same cannot be true of an arbitration clause, that "Article 5(1)(d) has no equivalent in the New York Convention but that is only because it is unique to the mediation context, where a mediation agreement could possibly preclude or limit enforceability as one of its terms").

[79] Schnabel, *The Singapore Convention*, *supra* note 19, at 48-49; *see also* Schnabel, *Implementation of the Singapore Convention*, *supra* note 23, at 271 ("Any limitations on relief that parties include in the settlement agreement should be given effect, such as forum selection clauses or even opting out of the Convention's framework entirely.").

[80] *Cf.* Zeller & Trakman, *supra* note 16, at 457 ("The scope of this opt-out provision is not yet tested.").

predictability[81] and illustrates what is arguably a substantial shortcoming of the Singapore Convention.

H. *Antecedents*

Last, limiting the availability of set-aside is not without precedent, and the history of such efforts is instructive. Belgium in 1985 amended its arbitration law to the effect that for arbitrations in Belgium without Belgian parties, there would be no set-aside procedure available before Belgian courts.[82] The effect was that "[p]arties turned away from Belgium as a place of arbitration," "Belgium was . . . black-listed by arbitral institutions," and it eventually reversed course, abolishing the amendment and returning the set-aside recourse.[83]

Similarly, to this day the Swiss Federal Statute on Private International Law permits two non-Swiss parties to opt out of set-aside proceedings in Switzerland.[84] Parties avail themselves of this option only on rare occasions, and the majority opinion among scholars now comes out against a waiver clause in a contract because recourse to the federal court for the setting aside the arbitral award is efficient: it has a maximum number of grounds for set-aside; it is limited to a single proceeding; it does not have a *lis pendens* effect on enforcement of the award; and it is decided in less than six months.[85]

As has been observed, "[i]t is telling that indeed it is rare to find in practice an agreement expressly excluding the action for setting aside the award. What [this]

[81] For instance, the Swiss Federal Statute on Private International Law, art. 192(1), explicitly allows for opt-out ("If none of the parties have their domicile, their habitual residence, or a business establishment in Switzerland, they may, by an express statement in the arbitration agreement or by a subsequent written agreement, waive fully the action for annulment or they may limit it to one or several of the grounds listed in Art. 190(2)."). However, while the statute was adopted in 1982, it was not until 2005 that the Swiss highest court accepted a valid waiver. Tribunal federal [TF] [Federal Supreme Court] Feb. 4, 2005, 131 ARRETS DU TRIBUNAL FEDERAL SUISSE [ATF] III 173.

[82] Belgian Arbitration Law of 1985, adding a new paragraph to the CODE JUDICIARE/GERECHTELIJK WETBOEK [JUDICIAL CODE], art. 1717.

[83] Van den Berg, *supra* note 36, at 275 (citing Belgian Arbitration Law of 1998, amending the JUDICIAL CODE, art. 1717(4)).

[84] *See supra* note 86.

[85] Van den Berg, *supra* note 36, at 276 (citations omitted).

seems to show is that practice does not wish to abandon the action for setting aside the award in the country of origin as a universal bar to enforcement of a dubious award."[86] If the same holds true for mediated settlements, the default lack of a set-aside mechanism—even more so than the potential for opt out under the New York Convention's local implementing legislation in some jurisdictions—may prove to be unpopular with parties and therefore pose a significant obstacle to the success of the Singapore Convention.

I. *A Possible Cure Through Modification of the Singapore Convention*

Paralleling the New York Convention, the Singapore Convention could provide that the "seat" of the mediation—regardless of the actual physical location of the participants—would be the place agreed by the parties in the agreement to mediate or, failing a selection by the parties, the place designated by the mediator at the outset of the mediation. From that, it would not be much of a stretch to prescribe for set-aside applications to be heard at the seat and for enforcement elsewhere to follow the challenge at the seat.

Such relatively simple revisions from a drafting perspective would, the authors submit, give the Convention real meaning and opportunity to make international mediation as much a staple of international dispute resolution as international arbitration has become due, in no small measure, to the New York Convention.

## V. CONCLUSION

The Singapore Convention's goal of facilitating the enforcement of international commercial mediated settlements is laudable; yet in addition to the lingering question of whether the Convention will enter into force, there is reason to question whether it should in light of the shortcomings discussed above. Despite the Convention's professed goal of "limiting" non-enforcement grounds in the image of the New York Convention,[87] and the intent of being "more efficient than litigation under contract

[86] Id.

[87] UNCITRAL, Forty-Ninth Session, Report of Working Group II (Arbitration and Conciliation), U.N. Doc. A/CN.9/861, at 17 (Sept. 17, 2015).

law,"[88] many of the non-enforcement grounds borrow from traditional contract law defenses and would now subject mediating parties to each jurisdiction's "flexibility" regarding legal interpretations of such grounds–something certain to vary across jurisdictions.[89]

Further, and most notably, unless the Singapore Convention is revised to add a set-aside mechanism, there is no effective recourse against repeated attempts at enforcement in multiple jurisdictions, no matter the merits of setting aside a particular settlement agreement. Instead, as the Convention now stands, it would leave those resisting enforcement no choice but to defend against enforcement actions in every single jurisdiction where the party seeking enforcement happens to file suit. This, the authors submit, deprives the Convention and those employing it of effective safeguards against flawed settlement agreements–safeguards that are customary in international dispute resolution.

Of course, the Singapore Convention permits parties to opt out of its coverage, but even if that can be thought of as a silver lining, it also confesses a fatal flaw. At any rate, from a risk mitigation standpoint when transacting in foreign markets,[90] for the time being it is the authors' view that there is no reason to opt for relying on the Singapore Convention over conventional methods of enforcing mediated settlements.[91]

**DAVID J. STUTE** is a transnational disputes associate with Pillsbury Winthrop Shaw Pittman in Washington, D.C. He has litigated cases between private and public companies, investors, states, and state-owned entities under various treaties and arbitral rules. His articles on transnational and comparative law have been published by Arbitration International, the Michigan Journal of International Law, the New Law Journal, Thomson Reuters, and the American Journal of Comparative Law (2021).

[88] Schnabel, *The Singapore Convention*, *supra* note 19, at 4.

[89] UNCITRAL, Forty-Ninth Session, Report of Working Group II (Arbitration and Conciliation), U.N. Doc. A/CN.9/861, at 17 (Sept. 17, 2015).

[90] Id.

[91] See Strong, Beyond International Arbitration, supra note 42; REISMAN, supra note 46.

**ALEXIS N. WANSAC** is a litigation associate with Pillsbury Winthrop Shaw Pittman in Washington, D.C. Her practice is varied and includes work in insurance recovery litigation, real estate litigation, construction litigation, international arbitration, and white-collar defense.

# BOOK REVIEW:
## INTERNATIONAL ARBITRATION AND THE COVID-19 REVOLUTION EDITED BY MAXI SCHERER, NIUSCHA BASSIRI, AND MOHAMED S. ABDEL WAHAB

*Reviewed by* Craig D. Gaver

Louis XVI: "*C'est une grande révolte.*"
Duc de la Rouchefoucauld-Liancourt: "*Non, Sire, c'est une grande Révolution.*"[1]

Harry Truman: "*You've had a revolution.*"
George VI: "*Oh no! We don't have those here.*"[2]

### I. INTRODUCTION

Is it or is it not? The editors of International Arbitration and the COVID-19 Revolution abstained, perhaps wisely, from determining whether the pandemic's effect on international arbitration manifests a revolution of new fundamental changes or has "merely reinforced existing trends."[3] Instead, they rest safely with the observation that the "COVID-19 crisis has triggered profound and systemic changes."[4]

Few would disagree with this assessment. Technological advances, including even artificial intelligence, have been assimilated in the field of international arbitration for years. But who would have predicted that nearly all hearings, conferences, and meetings in 2020 would be conducted through electronic means? Indeed, in February 2021, a virtual court hearing featuring a "Zoom cat lawyer," a hapless attorney bearing the face of a kitten due to video conferencing filters, has gone viral outside of the legal profession.[5] Prior to the pandemic, few would have been able to

[1] Ferdinand Dreyfus, Un Philanthrope D'autrefois: La Rochefoucauld-Liancourt, 1747–1827 509 (Nabu Press 2010) (1903).

[2] Hugh Dalton, Diary Entry (July 28, 1945), *in* THE POLITICAL DIARY OF HUGH DALTON, 1918–40, 1945–60 361 (Ben Pimlott ed., 1987).

[3] *See generally* INTERNATIONAL ARBITRATION AND THE COVID-19 REVOLUTION (Maxi Scherer, Niuscha Bassiri, and Mohamed S. Abdel Wahab eds., 2020); *see also* Preface to *id.* at xxix.

[4] *Preface* to Scherer et al., *supra* note 3, at xxix.

[5] Daniel Victor, *'I'm Not a Cat,' Says Lawyer Having Zoom Difficulties*, N.Y. TIMES (Feb. 9, 2021), https://www.nytimes.com/2021/02/09/style/cat-lawyer-zoom.html.

imagine how this issue would arise in the first place.

The authors of the book's individual chapters grapple with various questions relating to the impact of the COVID-19 pandemic on international arbitration practice. For example, are these developments a sea change or something more modest? Are the changes compatible with the current legal framework of international arbitration or do they threaten it? Are the changes extensions or past developments or are they new innovations? Are these changes temporary or will they endure? The book succeeds in recording the strange times and experiences associated with the pandemic and its effect on international arbitration practice, as well as providing nuanced and practical answers and insights into these fundamental questions.

## II. THE BOOK

INTERNATIONAL ARBITRATION AND THE COVID-19 REVOLUTION comprises seventeen chapters which touch upon the legal, practical, theoretical, empirical, and sectoral aspects of international arbitration during the pandemic. Even within chapters, the authors and editors do an admirable job of taking a multifaceted approach with each topic addressed and offering practical solutions and guidance.

The most obvious change wrought by the pandemic, as previewed above, has been remote hearings. In Chapter 4, Maxi Scherer sets forth the legal framework for remote hearings, a term preferred for its accuracy to "virtual" or "online" hearings.[1] Although she finds that remote hearings are not a new phenomenon, their expanded use from minor procedural conferences to main merits hearings was a significant development in 2020. At the heart of the debate concerning remote hearings is whether a remote hearing may be imposed against the wishes of an opposing party. The question touches upon a party's right to be heard and right to be treated equally, both fundamental principles in international arbitration. Her examination of the question is supplemented well by the book's appendix, which surveys the laws of common arbitral seats to determine whether a remote hearing can be held against a

[1] Maxi Scherer, *Chapter 4: The Legal Framework of Remote Hearings*, *in* Scherer et al., *supra* note 3, at 65, 68–72.

party's wishes. Similarly, Erica Stein, in Chapter 9, examines challenges to arbitration awards rendered after remote hearings, focusing on the context of enforcement and annulment proceedings.[2] As remote hearings and their ensuing awards become more common, a *jurisprudence constante* on the issue will hopefully be established, although there is certainly a clear trend that such awards are fully enforceable.

Several of the chapters are predominantly (though not entirely) retrospective in that they seek to collect and present the experiences of international arbitration participants during 2020. Patricia Shaughnessy, in Chapter 2, and Gary Born, Annelise Day QC, and Hafez Virjee, in Chapter 7, for example, survey and provide empirical feedback from arbitral institutions and users, respectively, on their experiences with remote hearings.[3] Rather than speculate, these authors convincingly demonstrate that institutions were flexible and adept in responding in the face of crisis. Other participants, *e.g.*, parties and counsel, accepted these changes in light of the circumstances, even if they were considered less ideal than in-person hearings.[4] Indeed, some have suggested that there are actually benefits in certain circumstances to remote hearings. Accordingly, as noted by Shaughnessy, although "[i]t is not likely or even desired that virtual hearings become the norm . . . [after the pandemic,] it should become the norm that parties and arbitrators consider virtual hearings."[5]

Chapters 12 through 17 approach the topic in the context of specific sectors: construction, energy, aviation, TMT, finance, and insurance. Each of these chapters helpfully recount the initial effects of the pandemic on certain sectors, as well as survey what disputes have and might arise as a result of the COVID-19 pandemic. Further, each chapter serves as a useful summary introduction to the sector in

[2] Erica Stein, Chapter 9: Challenges to Remote Arbitration Awards in Setting Aside and Enforcement Proceedings, in Scherer et al., supra note 3, at 167.

[3] Patricia Louise Shaughnessy, Chapter 2: Initiating and Administering Arbitration Remotely, in Scherer et al., supra note 3, at 27; Gary Born, et al., Chapter 7: Empirical Study of Experiences with Remote Hearings: A Survey of Users' Views, in Scherer et al., supra note 3, at 137.

[4] *See*, *e.g.*, Born, et al., *supra* note 8, at 144–49.

[5] Shaughnessy, *supra* note 8, at 46.

general. These chapters also provide insightful overviews of applicable legal doctrines related to such disputes, such as *force majeure*, change-in-law clauses, frustration or impossibility/impracticability. However, without discounting the different effect each of those doctrines might have in different sectors, it might have been helpful to dedicate a chapter of the book to a comparative survey of those important doctrines. Indeed, it is not until page 8 of the book that the term "*force majeure*" first appears, even though this was often the central (at least initially) focus relating to disputes during the pandemic. This centrality deserves a detailed examination of the doctrine's application in pandemic related disputes and issues.

Certain chapters are highly practical related to remote hearing practice and procedure. In Chapter 5, for example, Niuscha Bassiri offers a template procedural order to ensure that a remote hearing does not neglect important considerations, such as a pre-hearing test videoconference, the procedural sequence, hardware and software, etiquette, evidence, and document management.[6] In Chapter 6, Wendy Miles QC updates a Toby Landau QC lecture on witness testimony to provide helpful advice for advocacy, witness preparation, and cross-examination under the unique circumstances and challenges of remote hearings.[7] In Chapter 3, Catherine, A. Rogers and Fahira Brodlija examine what considerations the pandemic has had or ought to have on the selection and appointment of arbitrators.[8]

Other chapters are more theoretical and discuss specific legal issues. For example, in Chapter 8, Erik Schäfer considers the promise and challenges of the e-signature of arbitral awards, thus eliminating the tyranny of distance.[9] Remote

[6] Niuscha Bassiri, Chapter 5: Conducting Remote Hearings: Issues of Planning, Preparation and Sample Procedural Orders, in Scherer et al., supra note 3, at 105.

[7] Wendy Miles, Chapter 6: Remote Advocacy, Witness Preparation & Cross-Examination: Practical Tips & Challenges, in Scherer et al., supra note 3, at 121 (citing Toby Landau QC, Tainted Memories: Exposing the Fallacy of Witness Evidence in International Arbitration, Kaplan Lecture, NEIL KAPLAN, https://www.neil-kaplan.com/kaplan-lecture (click hyperlink for 2010 Toby Landau QC lecture)).

[8] Catherine A. Rogers & Fahira Brodlija, *Chapter 3: Arbitrator Appointments in the Age of COVID-19*, *in* Scherer et al., *supra* note 3, at 49.

[9] Erik Schäfer, *Chapter 8: E-Signature of Arbitral Awards*, *in* Scherer et al., *supra* note 3, at 151.

hearings also raise obvious questions as to confidentiality and security; and Schäfer provides technical insight into digital signatures, as well as an illustration of their treatment by German civil law, in an easily digestible way.[10] He also discusses cybersecurity, an extremely important topic.

Returning to the initial question posited above, the authors of Chapter 11 assert that "the future of international arbitration is not over yet," likening the effect of COVID-19 on the field to that of the Chicxulub asteroid's impact on Earth: it was a significant event in itself, to be sure, but it also provides the starkest delineation between what came before and after. The authors applaud the democratizing effects of remote hearings and warn not to take these changes for granted or let them backslide.[11]

This discussion in Chapter 11 is useful for illustrating one of the few shortcomings of the book. The impressive list of 28 contributors spans a number of national jurisdictions, allowing the authors to provide sophisticated insight into the law and practice of their home jurisdictions, including Egypt, France, Germany, the UK, the US, and others. On the other hand, only three of those 28 contributors appear to be based outside Europe or North America. Although certain other jurisdictions are discussed in passing, it would have been interesting to highlight the unique pandemic experiences of those in other parts of the world and provide a more diverse set of reference points to this discussion.

## III. CONCLUSION

Overall, International Arbitration and the COVID-19 Revolution succeeds in capturing the international arbitration community's response to the unforeseen, chaotic challenge of the pandemic. No doubt, the book will be consulted frequently when considering novel legal questions the pandemic has raised, but it is even more impressive as a practical guide: It is an indispensable practice resource for managing

[10] *Id.* at 154–62.

[11] See, e.g., Ema Vidak-Gojkovic & Michael McIlwrath, Chapter 11: The COVID-19 Revolution: The Future of International Arbitration is not Over Yet, in Scherer et al., supra note 3, at 191, 198–201.

remote hearings and addresses other issues raised by the pandemic. And since the book contains practical, distilled wisdom from leading practitioners, it also provides important insights for solving future challenges international arbitration will surely face in the coming years.[12]

**CRAIG D. GAVER** has practiced international arbitration in Washington, DC and the Arabian/Persian Gulf under the ICSID, UNCITRAL, ICC, and LCIA rules.

[12] For example, in Chapter 1, Mohamed Abdel Wahab discusses the field of crisis management and the meaning and conduct of dispute resolution in the wake of a crisis. Mohamed S. Abdel Wahab, *Chapter 1: Dispute Prevention, Management and Resolution in Times of Crisis Between Tradition and Innovation: The COVID-19 Catalytic Crisis*, *in* Scherer et al., *supra* note 3, at 1.

# KEYNOTE REMARKS:
# ETHICS AND ONLINE ARBITRATION – BRAVE NEW WORLD OR 1984?

*by* Justin D'Agostino

Keynote address delivered at the 32nd Annual ITA Workshop and Annual Meeting held virtually, on June 17, 2020.

Will virtual hearings mean a new age of efficiency, or Big Brother meets the Wild West? Can we arbitrate online without sacrificing conduct and confidentiality? The keynote addresses this and other difficult topics.

## I. INTRODUCTION

It is an honor and privilege to stand before you today to deliver the Keynote Address. I am sure you are all familiar with the two books that I reference in the title for my keynote address.

"Brave New World" was written by Aldis Huxley in 1931, and it describes a future society in which humans are genetically engineered to fall into one of five social classes based on their intelligence and ability to work. The Alphas are designed to be leaders and thinkers, enjoying every advantage that the world/state can offer. And the lowest caste, the Epsilons, are condemned to a life of menial labor.[1]

George Orwell's "1984" is a similar dystopian view of the future under a repressive regime that controls its citizens' every thought through the infamous "Big Brother", making it impossible to keep anything confidential or private—even the most personal thought or relationship.[2]

This morning, I am going to ask for your indulgence because neither of those two novels in the title portray a positive view of the future. Both are premised on the idea that the advancement of technology is a bad thing. That it erodes societies' ethics. That it erodes societies' freedoms and individual freedoms.

But, actually, I believe that the advent of technology in arbitration is a positive development to be welcomed. Specifically, I do not think that using more technology

[1] ALDOUS HUXLEY, BRAVE NEW WORLD (Harper Perennial 2006) (1932).

[2] GEORGE ORWELL, 1984 (Signet Classic 1961) (1949).

in arbitration necessarily means the process will become less ethical. On the contrary, I think the move to doing more online can and will create a brave new world that is much more positive than Huxley's. More than that, I think it will be a much more positive place than the world of international arbitration as we know it today.

Before I explain what leads me to that conclusion, it is worth exploring what we really mean by "online arbitration," and what gives rise to the concerns that might make arbitration "less ethical."

## II. WHAT IS ONLINE ARBITRATION?

As many have pointed out, the phrase "online arbitration" describes the whole arbitral proceeding, from request to award, and this phrase has been widely used in the last few years, mostly in a way that suggests that it is an entirely new process. But, in practice, we have been conducting arbitrations online for many, many years. We file the notice by email, the institution replies by email, email is the default method of communication amongst the institution, parties, and the tribunal, and increasingly parties file pleadings by email or by uploading to an online repository. Case management conferences are held by phone or video conferences. Tribunals issue their decisions, orders, and awards by email, often bearing electronic signatures. So, the exception, of course, is hearings.

Until the COVID-19 crisis, every merits hearing I have ever attended had been in person. I suspect the same is true for most of us. However far we had to travel; however big the logistical challenges of getting 30 plus people, thousands upon thousands of documents, all to one place; however, much it cost that was invariably what we did. We travelled and we spent the money. Occasionally, a witness would give evidence by a video link to the hearing room. But, in my experience, it would usually be only one or two witnesses who could not attend in person. Everyone else was together in one room. By everyone else, I mean the tribunal, its secretary, counsel, party representatives, interpreters, transcribers, and witnesses. In a large commercial arbitration, there can be scores of people in the room for the entire hearing, no matter how long it might last. We have become used to the logistical, financial, and environmental costs of such hearings.

But take a step back. Those costs are significant. In the post-COVID world, I venture it would be difficult to justify. If you had asked most arbitrators, even this time last year, whether they would conduct a merits hearing completely virtually, many of them would say "No." They might even have told you that it is impossible to deliver due process in an online merits hearing for two weeks. Counsel would have objected if it was too difficult to cross examine witnesses virtually. Most lawyers would have advised their clients against agreeing to a fully online virtual hearing.

Now, COVID has made it impossible to hold hearings in person, and we have had to rethink. In a world where we cannot travel and we cannot gather in a room, and it is not good to be able to cross countries by foot, there are only two options: to postpone the hearing indefinitely or move it online. Necessity being the mother of invention, and delay being generally undesirable, the arbitral community has embraced the virtual hearing almost overnight. Really. It is only the hearings that have recently moved online, and as a direct result of the pandemic. For this reason my thoughts today are focused mainly on virtual hearings, rather than on online arbitration as a whole.

## III. ETHICAL CONCERNS ABOUT VIRTUAL HEARINGS?

From what I have seen so far, virtual hearings seem to work well. It is of course early days, and there are a variety of experiences. On the whole, however, the feedback has been good. Moving hearings online has certainly been more successful than many stakeholders had anticipated. But there are still concerns. Some are purely practical. Some, if borne out, may affect the ethical aspect of the arbitral process.

Broadly, these concerns fall into five categories:

1. Confidentiality;
2. Witness evidence;
3. Equality of arms;
4. Technology; and,
5. Human behaviour.

I would like to look at each in turn, including how valid each concern may or may

not be. I will then turn to the ways in which we can address those concerns and whether our hesitations are in fact outweighed by the positive aspects of moving hearings online.

A. *Confidentiality.*

There is very understandable concern about sharing commercially sensitive information using technology. This is not confined to arbitration but is magnified when conducting what is inherently confidential processes over the internet.

As we all know, parties choose to arbitrate, in part because the process is private, and hearings are not open to the public. Thus, it is natural to worry about losing that confidentiality if the process moves online. Parties may be concerned that the other side is recording the hearing without authorization, and it may release the recording to a competitor, the press, or to the public at large. They may worry that a third party will hack the software and gain access to information to which it has no right. The software provider or technician might misuse the data. We all know the concerns of vulnerability of data breaches across much of our lives. More basically, a party may feel it cannot control who is present in a virtual hearing. For example, if the other side allows a third party into the virtual hearing room or shares an access password.

Another concern relates to witness testimony. Parties worry that the other sides' counsel may somehow coach the witness for cross examination. Or that the witness might have more than one screen and may be reading answers to the questions. Where a witness is testifying in another language, it can also be more difficult to use interpreters if the witness, interpreter, and cross examiner are all in separate locations. Even without interpretation, counsel often feel that it's difficult to cross examine remotely. Advocates complain that it is impossible to achieve any rhythm in cross, unless counsel and witnesses are in the same room. This is exacerbated if the connection is poor, if it is difficult to hear or see the witness, or if there is a time lag between the question and the answer.

Many lawyers and arbitrators indicate that it is more difficult to read a witness' body language or other physical cues if he or she is not physically present, making it harder to assess the witness' credibility. Joe Navarro, a former FBI agent and leading

body language expert, says that it is the feet that are the best place to look for emotional shifts in reaction.[1] So, if your screen is only showing the witness' head, he says that you not only lose the ability to see his or her feet, but the rest of the body as well, and those important cues. This is not to say that it is impossible to gauge people online, but it is undoubtedly harder.

A former colleague of mine who has a doctorate in psychology, provides a useful analogy. She says that trying to read a person online is like trying to read a document with half the vowels missing. You can still do it, but it takes far more cognitive effort, and there is a very good chance that you will get the odd word wrong. Thus, there are grounds for worrying that a dishonest witness may be harder to expose if they are separated from a cross examiner by a screen. Most witnesses, of course, are not dishonest. But it still may be harder for counsel and the tribunal to read them, to assess the strength of the testimony, when you cannot see them in the flesh.

B. *Equality of Arms & Technology*

An equal opportunity to present your case is another serious issue. Equal treatment of the parties of course is the fundamental principle of international arbitration. As we all know, a tribunal that fails to treat the parties equally, risks its award being challenged and set aside. Conducting a hearing remotely can give rise to numerous risks around equality. The most obvious is where one party wants a virtual hearing and the other does not. There is an active debate on whether the tribunal's discretion entitles it to order a remote hearing over a party's objection. Many of you may have seen Mohamed Abdel Wahab's excellent article in GAR last month,[2] which proposes a pathway to determine the extent of the tribunal's power by considering the applicable law and the procedural rules.

Assuming a party is ordered, or the tribunal does order a remote hearing, there are many potential inequalities. What if one party is located in a jurisdiction with poor internet connectivity, or electricity that cuts out every hour? What if one party

[1] *See* Joe Navarro Forensics, https://www.jnforensics.com/.

[2] Mohamed Abdel Wahab, What if Parties Don't Agree on a Virtual Hearing? A Pandemic Pathway, GLOBAL ARB. R. (May 6, 2020)

does not have access to appropriate technology, laptops, etc., while the counterpart enjoys the benefit of good connectivity and equipment? What if your counterpart has technical support and you do not? What if your witness is giving evidence to an interpreter while the other sides are not, and there is a large time delay on the video call? The issues of time zones—is it fair that the hearing is timed to fall on a business day where one party is based, but very late at night for the other? Is that fair?

In most developed seats, courts are resistant to efforts to set aside or resist enforcement except in most egregious cases. There is no reason to think that this will change simply because the hearing was held remotely. However, my examples show that the remote hearings could provide fertile ground for award debtors to try to set aside or resist enforcement. Even if these applications ultimately fail, we know that time and money may be lost in defending them.

There are valid concerns about a hearing that relies on technology if the arbitrators themselves are not comfortable with that technology. This will not always be an ethical issue, but it could be. For example, if the tribunal's ability to manage the IT significantly disrupts the hearing or means the hearing overruns and the time for witness testimony is cut short, that could give rise to problems. We did an arbitration with an arbitrator who was completely unused to video conferencing. He was unfamiliar with the mute button, with the camera, repeatedly put his finger over the camera and the like, and he just could not work it.

Tech concerns are not confined to arbitrators. Most of us had never heard of Zoom, Blue Jeans, or Microsoft Teams before this year. Now, we are being asked to use them in two-week hearings in billion-dollar cases. Arbitrators and lawyers are not known as being particularly tech savvy. As a group, we are not the early adopters. We tend to hang back, stick to what we know, and evolve slowly. But that is not an option in the post-COVID world.

C. *Human Behaviour.*

Before I turn to solutions, I have one final thought in terms of the challenges, and that is around human behaviour. I wonder if there is a concern that individuals, that is, counsels and witnesses, may behave less ethically when they know they will not

come face-to-face with the other side. Do we naturally feel that a person testifying to a screen in an empty room may be less reluctant to bend the truth, or lie outright, than if he or she were sitting feet away from senior arbitrators, flanked by lawyers?

Experience with social media has taught us that people are willing to make offensive, threatening, and abusive comments online in a way that we rarely see in person. Many put their names to their comments, so it is not anonymity that emboldens them. Online, people seem much more willing to ignore the societal norms that would stop them from saying the same thing to someone's face. Being separated by a screen emboldens people, often in ways that are unpleasant, unhealthy, and sometimes illegal. Of course, most people do not spend their time trolling people online, but significant numbers do. I just wonder if we have learned consciously or otherwise to view online platforms as places where people do not respect society's conventions, and where they feel less constrained by ethics.

There are many ways in which moving hearings online can be detrimental to the values of the process, and these are all valid concerns. It is for the arbitration community to have to evaluate, address, and overcome them.

Many of our worries, I think, stem from a lack of control. Now, it seems less easy for any party or tribunal member to control the process that is conducted remotely than if all participants are physically present in the same room. As a matter of human nature, that is entirely natural. Lack of familiarity is another root cause. We are having to find new ways of working and new technologies, all at once. The learning curve is really, extremely steep. It is only natural that we are hesitant. However, I would argue that these feelings will naturally dissipate as we become more accustomed to remote hearings. Human beings, even lawyers, are traditionally adaptable.

With arbitrations, it will never be possible to stamp out unethical behaviour entirely. Even where a hearing takes place in person, someone could have a recording device tucked into his suit pocket or could be handing out confidential documents to a third party. We have long been concerned with arbitrators using Hotmail and Gmail, and the risk that poses to confidentiality and data security. Many of us have had

witnesses lie in cross examination despite sitting in front of the tribunal.

But my view is that the community will overcome the ethical challenges and will move forward with virtual hearings in a way that does not prejudice the process. Indeed, I would go further. I think that moving hearings online will improve arbitration in a number of ways, and not just the costs or the carbon footprint. In the meantime, there are a number of ways to alleviate even the most common concerns.

## IV. POTENTIAL SOLUTIONS?

What are the solutions? While much has been written on this, including articles by Prof. Maxi Scherer[3] and Arbitrator Janet Walker,[4] and I do not claim to offer much original advice, I want to highlight some suggestions offered, as our community starts to grapple with the challenges of online hearings.

I would venture that virtual hearings are likely to be part of the new normal. Virtual hearings will be part of the new normal even after COVID subsides—that much is clear. It does not mean that every hearing from now on will be conducted remotely. But I suggest that virtual hearings are now on our radar as never before, and are here to stay.

Just as transactional lawyers are putting force majeure clauses into every contract, arbitrators are well advised now to include in their first procedural order the possibility of virtual hearings and to include a virtual hearings protocol. This will be a change, but a necessary one, and I think a welcome one.

Part of the solution would lie in the importance of soft law. There are numerous guidelines already available. Arbitral institutions have published guides in the wake of COVID, which are practical and helpful. There is also the Seoul Protocol on Video Conferencing in International Arbitration[5] and the Hague Conference Draft Guide to

[3] Maxi Scherer, Remote Hearings in International Arbitration: An Analytical Framework, 37 J. INT'L ARB. 407 (2020).

[4] Janet Walker, *Virtual Hearings: An Arbitrator's Perspective*, (2020), https://int-arbitrators.com/wp-content/uploads/2020/03/Virtual-Hearings-An-Arbitrators-Perspective.pdf.

[5] Seoul Protocol on Video Conferencing in International Arbitration (2018), http://www.sidrc.org/static_root/userUpload/data/[FINAL]%20Seoul%20Protocol%20on%20Video%20Conference%20in%20International%20Arbitration.pdf.

Good Practice on the Use of Video Links Under the Evidence Convention[6] from March 2019.

In terms of appropriate technology, there is some good practice emerging. First, it is important to understand the minimum technical standards that need to be applied to the quality of the feed and the delay. The Seoul Protocol sets these out well and provides a useful checklist for engaging with technical providers. For some it may be easier said than done. But using the best technology available clearly helps. That includes hardware that's fit for the purpose, licensed secure software, and the best internet connection you can obtain. Consider working with external service providers to facilitate the process and have someone on hand to provide technical support during the hearing, to help set up, and in case the IT fails.

Another technology that I am regularly seeing now is the encryption of signals to avoid illegal interception during the hearing and requiring passwords to access the virtual hearings and breakout rooms. Many commercial software packages are now offering end-to-end encryption. Another very practical piece of advice is to test every aspect of the technology well before the hearing. Testing the platform well with the parties present from every computer that will be used on the day and the location they will be in on the day of the hearing. The test will be done ideally more than once. Just because it works once does not mean it will always work. We did a hearing earlier this year in a less well-known arbitral centre. On inquiring about the internet, we were told that it is completely reliable, unless it was raining. So, test and ask questions.

In terms of witness tools, use cameras that pan, tilt, and zoom to scan the room and pick up any other person present. Or simply ask the witness to do so if you cannot. Consensus also is that sequential interpretation works better than simultaneous when the interpreter and the witness are in different places.

These solutions address many of the concerns that I have identified. However, I

[6] Hague Conf. on Private Int'l L., *Guide to Good Practice on the Use of Video-Link under the Evidence Convention* (2020), https://www.hcch.net/en/publications-and-studies/details4/?pid=6744.

have "nailed my colors to the mast," and I have claimed that moving hearings online will positively improve arbitration. I would like to finish by fleshing out that claim. To do that, I need to shift my focus from the risks of online arbitration to the rewards.

## V. IMPROVEMENTS TO THE ARBITRAL PROCESS

How will virtual hearings improve the arbitral process? It is essentially by providing more reward than risk.

There are obvious significant cost advantages by moving the hearing online. By avoiding the need to travel, to rent expensive facilities, to print bundles, you eliminate some of the major costs associated with the hearing. The lawyers' fees remain constant, of course, but even they will need to travel less.

We are all familiar with the challenge of fixing two-week hearings with busy arbitrators, particularly if they have to travel for the hearing. Moving online does not entirely remove these challenges, but it does reduce them. Arbitrators are more likely to be able to find two weeks if they do not have to travel on either end. Remaining home reduces their overall time commitment and allows them to schedule other commitments around hearing days. Alternatively, the tribunals may split the hearings into shorter periods, rather than having to hear it all at once and fly home. If we are all not in the same place, the tribunal can split up the hearing much more easily. The same applies to counsel teams. Moving online also avoids the issue of obtaining visas.

In terms of process improvements, once we all get used to them, there is potential for online hearings to run more efficiently than in person hearings.

Providers are now offering excellent real time transcription services, including on-screen captions which are known to help us understand better what we hear. Moreover, an entire hearing can be recorded creating a full audio-visual record. Tribunals may find that more useful than a transcript, particularly if they are assessing witness credibility and want to re-assess the witnesses' demeanour, as well as his words.

Many platforms provide virtual breakout rooms in addition to the main hearing room. This allows the tribunals to deliberate or the counsel teams to confer; so that is not lost. We can also integrate very easily into this new tech aids like video clips,

diagrams, and slides, seamlessly into the hearing software and test them in advance.

Compare that to the messing around with laptops and USB sticks under the eyes of the arbitrators. It seems to me like a clear improvement. Electronic bundles were all the documents are collated in soft copy are already a major step forward. We are already doing that of course, but it is easier to access a specific document during the hearing using a software. Counsel can present a document to a witness during a cross examination or pull it up to support a point made in oral submissions. Even better, a technician can be tasked with managing the documents online. Surely this is better than going through paper files and bundles while the entire room waits for you to search for a document.

I want to say a word about increased diversity. There have long been calls to appoint younger arbitrators. For international arbitration to survive, we must expand the pool of arbitrators. If arbitration relies heavily on technology, arbitrators will need to be more tech savvy. Adding that criteria may increase the diversity faster than now, as it may benefit the younger generation of arbitrators.

It is also important to pause on the environmental impact. There are increasingly insistent calls to reduce arbitration's environmental impact. Online hearings will significantly reduce the number of flights we take, with a significant reduction in our carbon footprint. Electronic bundles radically reduce paper use. The younger generation is often drives the environmental agenda. If we end up with more arbitrators from that generation, they may order more online hearings—a welcome, virtuous circle.

## VI. CONCLUDING REMARKS

Many of these positive changes would have come in time; COVID has simply accelerated the pace of change. Will it be a revolution? Will it be a total shift to online? Well, probably not.

Old habits die hard. Once COVID has passed, and it will pass (hopefully), many arbitrators and parties will go back, I am sure, to in person hearings. What has shifted—I think forever—is the arbitration community's openness to more virtual hearings. Alongside that will come a rapid shift in our ability to use technology.

We would have got there eventually without COVID, and probably we would have all become more reliant on remote solutions over the next, say, five years. But gradually and generationally, led by the younger members of the community, COVID has been a catalyst and it has accelerated that change.

The COVID crisis has pushed the arbitration community, perhaps unceremoniously, over its resistance and straight into the brave new world of technological solutions to human problems. It is up to us to embrace it and to reap the rewards.

**JUSTIN D'AGOSTINO** is Herbert Smith Freehill CEO, overseeing people, practices, clients and growth strategies. During his 21-year career with Herbert Smith Freehills, Justin has overseen the growth of successful businesses including the firm's market-leading Disputes practice and rapid expansion in Asia. A thought leader and skilled practitioner in arbitration and dispute resolution, Justin has appeared before tribunals around the world and regularly sits as arbitrator.

# COMMENTARY ON THE PANEL "A TOUR AROUND THE ARBITRATION WORLD—COMMONALITIES AND DIVERGENCES IN A TIME OF DISRUPTION"

*by* J. Brian Johns

## I. INTRODUCTION

At the time of the 32nd Annual ITA Workshop, the field of international dispute resolution found itself in a period of challenge and change. Recent developments in the Americas and Europe sparked questions as to the continued vitality of the investor-state dispute resolution regime. Concurrently, the health risks posed by the COVID-19 pandemic and the policies implemented by state governments to curtail the virus' spread presented significant obstacles to the conduct of arbitral hearings and portended a wave of future legal claims.

In that context, a diverse international panel of young practitioners titled "A Tour Around the Arbitration World – Commonalities and Divergences in a Time of Disruption" moderated by Marike Paulsson of the Albright Stonebridge Group and the University of Miami School of Law, attempted to predict how practice and the arbitration environment might evolve.

The panel was bifurcated into two sections. In the first half, panelists Vinicius Pereira (Campos Mello Advogados) and Sue Hyun Lim (International Division of the Korean Commercial Arbitration Board) discussed the procedural adaptions of arbitration practitioners and institutions in response to the COVID pandemic, including the proliferation of virtual hearings. The second half of the panel featured panelists Sylvia Sámano Beristain (Arbitration Center of Mexico) and Alexander Leventhal (Quinn Emmanuel Urquhart & Sullivan, LLP) who discussed regional developments in arbitration, including the European Union's recent agreement to dissolve bilateral investment treaties between member-states. Underlying each panel member's discussion was an acknowledgement that international arbitration and its practice methods must continue to adapt to the ever-changing world.

## II. A PRACTITIONER'S VIEW OF VIRTUAL HEARINGS

As arbitration practitioners and provider institutions have adopted tools to facilitate remote hearings, concerns have emerged as to the security and reliability of the available virtual platforms. Mr. Pereira offered a practitioner's perspective on the advantages and pitfalls of what he believes to be the "new future" of arbitration. In doing so, he highlighted four points for consideration in conducting remote hearings: (1) security and confidentiality, (2) the ability to read body language, (3) limitations on assessing the credibility of witnesses, and (4) the reduction of costs.

Mr. Pereira acknowledged that videoconferencing platforms commonly utilized for virtual, remote hearings are vulnerable to hacking and that some instances of compromised information and attempted interference have been reported. He noted, however, that the use of technology is not a novel feature in international arbitration, as parties and arbitrators have for years used email and online document management systems to convey and store important materials, including orders and awards. Arbitration practitioners have tolerated and controlled the risks inherent to these practices in the interest of convenience and efficiency. In Mr. Pereira's view, conducting hearings remotely does not significantly increase the risks that already exist.

Mr. Pereira identified as a more significant concern the ability of counsel to read participants' body language. Though he initially framed the problem as one of witness examination, Mr. Pereira explained that it extends to counsel's ability to assess all hearing participants. He noted specifically the challenges of determining the effectiveness of questioning on the arbitrators and even the difficulty of counsel in determining the impact of a witness on their client. In Mr. Pereira's view, the significance of these challenges speaks to the need for arbitrators to recognize a right of the parties to examine some witnesses in person.

In addition to the challenges of reading body language, Mr. Pereira observed that arbitrators and counsel could easily struggle with determining the credibility of a witness when considering their testimony via videoconference. Some solutions have been proposed to address this issue, including allowing opposing counsel to send a

single representative to observe the witness during their testimony to ensure that there is no witness couching or inauthentic claims of technical malfunctions. Mr. Pereira also identified the potential for the use of a second camera to observe the area around the witness but opined that such steps might impose too greatly on the witness' privacy.

As a final point, Mr. Pereira noted that virtual hearings offer the possibility of reduced arbitration costs. He viewed this as a benefit and means of expanding the use of the dispute resolution mechanism.

## III. AN INSTITUTIONAL PERSPECTIVE ON VIRTUAL HEARINGS

With countries imposing travel restrictions and a general uneasiness amongst arbitration participants to the health risks associated with in-person hearings, arbitral institutions have been required to adapt to facilitating non-traditional hearings. In her role as Secretary General of the International Division of the Korean Commercial Arbitration Board (KCAB), Sue Lim spoke on the impact of the global pandemic response on institutional arbitration and the steps taken by institutions to promote the advancement of cases when physical hearings are impractical or impossible.

Ms. Lim reported that approximately 30 cases pending before the KCAB had hearings previously scheduled to occur during the first four to five months of the pandemic. The overwhelming majority of these cases were able to move to a hearing, with only three cases canceling or indefinitely postponing their hearings. 18 cases proceeded virtually, with the consent of all parties, and ten cases proceeded with in-person hearings. Ms. Lim attributed the ability for in-person hearings to the Republic of Korea's low infection rates and robust system of contact tracing, which also allowed local courts to continue normal operations. Each of these cases also involved arbitrators located in Korea.

In those cases that did not proceed to a hearing, at least one party objected to virtual hearings. Ms. Lim explained that in one of the cases, the decision was necessitated by lockdown restrictions preventing a party from obtaining evidence necessary for their case. In another case, which Ms. Lim characterized as "a big

complex case with many fact witnesses," European arbitrators were unwilling to move forward with a hearing seated in Asia, which at the time had high infection rates. As the virus spread to Europe and the length of the delay increased, the tribunal and parties displayed more willingness to consider virtual options for advancing the case.

Ms. Lim noted that the KCAB, like many other institutions, uses lifesize®[1] as their virtual conference provider. Parties, however, are free to utilize other platforms with which they might be more familiar or comfortable. The panel members agreed that in many instances, parties will choose to utilize the conferencing system offered by the institution, which they perceive to be more neutral than those provided or organized by a case participant.

Ms. Lim also commented on the use of documents-only arbitration as an alternative to in-person hearings. In her opinion, the decision to waive a hearing and have a case decided solely on the submission of documents is influenced more by the complexity of the dispute and the need for witness examination than by limitations on the participants' ability to meet for hearings. She further opined that the decision might also be influenced by the case participants' legal tradition, as common law practitioners traditionally place greater significance on oral advocacy than civil law practitioners.

In looking to the future in which parties will again consider the method of hearing without the albatross of COVID restrictions, Ms. Lim opined that even though eliminating in-person hearings may provide cost and time benefits, the choice will inevitably be fact specific to each case. She believes that cases in which efficient resolution is vital will be more inclined to move forward with a virtual hearing. Conversely, cases in which the parties believe that a settlement is potential will be comfortable delaying resolution until a physical hearing is possible, allowing for further negotiation. Ms. Lim acknowledged that in some instances, the lack of an in-person hearing might prevent those settlements that could be achieved through party decision-makers being in proximity to one another. She noted, however, that such loss would exist only in those cases in which the party representatives capable of

[1] Lifesize, https://www.lifesize.com/en/

entering a binding agreement would be present at a hearing.

Ms. Lim concluded her remarks by discussing the Seoul Protocol on Video Conferencing in International Arbitration.[2] She noted that work on the Protocols predated the COVID-19 pandemic and was promoted by a rise in the use of videoconferencing in international arbitration, particularly among Asian parties. The Protocol are designed to provide best practices for virtual arbitration, and discussions are ongoing to revise their content to provide for situations of global lockdowns.

## IV. INVESTMENT DISPUTE RESOLUTION AND GLOBAL PANDEMIC

Government policies implemented to limit the spread of the COVID-19 pandemic have unavoidably impacted business and investment. Sylvia Sámano Beristain, Secretary-General of the Arbitration Center of Mexico, spoke on the potential for disputes arising out of these restrictions and the impact of the COVID-19 pandemic on inter-state dispute settlement.

Ms. Sámano forecasted that the post-COVID period will see many disputes involving state actors. Though many might consider investor-state arbitration as the logical mechanism for resolving these cases, she expressed that each situation must be considered on a case-by-case basis. Ms. Sámano cautioned that procedural hurdles will exist, the most prevalent being the need for an applicable bilateral or multilateral investment treaty providing an arbitral mechanism. Even in those instances in which a treaty is available, parties may be subject to requirements like mandated cooling off periods that are likely to obstruct or prolong resolution. There may also be challenges in legally analyzing the intentions and appropriateness of government actions and distinguishing those policies designed to take advantage of the pandemic from those ostensibly intended for the general public's good.

Ms. Sámano also spoke on the United States-Mexico-Canada Agreement (USMCA) that came into effect on July 2, 2020. The agreement was intended to serve as a successor to the North American Free Trade Agreement (NAFTA), though Ms. Sámano

[2] Seoul Protocol on Video Conferencing in International Arbitration (2018), http://www.sidrc.org/static_root/userUpload/data/[FINAL]%20Seoul%20Protocol%20on%20Video%20Conference%20in%20International%20Arbitration.pdf.

lamented that, in many ways, it falls short of its predecessor in the protections provided to investors. Unlike Chapter 11 of NAFTA, which many practitioners consider to be a pillar of modern investor-state arbitration, Annex 14 of the USMCA provides a resolution mechanism only for disputes between the US and Mexico. Disputes between Mexico and Canada can be resolved through mechanisms under the Trans-Pacific Partnership, but no mechanism persists for resolving investment issues between the US and Canada.

Ms. Sámano also noted that the USMCA offers fewer investor protections than NAFTA. Under the new agreement, investors may only bring suits alleging a breach of most favored nation status or expropriation without compensation. Claims for breach of minimum standards of treatment and indirect expropriation are no longer available to the average investor and are limited only to investments involving enterprises of the host-state. Investors must also submit their claims to domestic courts for a period of 30 months before initiating arbitration. Ms. Sámano considered this period excessive and opined that investors are likely to view these changes negatively. Mr. Pereira also expressed concern that patterns of shifting risk away from states and eliminating protections for investors would be detrimental to foreign investment.

## V. INVESTOR-STATE DEVELOPMENTS IN EUROPE

In recent months, much of the international arbitration community's focus has fallen on the obstacles caused by the COVID-19 pandemic and the likely ramifications of the policies implemented by state governments to address the global spread. Though commanding attention, these issues are only part of the mosaic of international arbitration. Mr. Leventhal of Quinn Emanuel Urquhart & Sullivan, LLP provided an update on the status of dispute resolution in Europe in the wake of the recent *Slovak Republic v Achmea* decision and the resulting policies of the European Commission.[3] In doing so, he acknowledged that the traditional model of investor-state arbitration is considerably weakened by the efforts of the European Commission

[3] Case C-284/16, Slovak Republic v Achmea BV, 2018 E.C.R. 158.

but pointed to signs for optimism for both states and investors.

The Court of Justice of the European Union's 2018 *Achmea* ruling cast a shadow over the future of treaty-based investment arbitration amongst EU member-states. In its wake, member-states committed to the termination of intra-EU bilateral investment treaties and in May 2020 entered into a formal agreement to do so. The only states to preserve their investment treaties were Austria, Ireland, Finland, and Sweden.

Though it severely limited investment arbitration in Europe, the agreement did not immediately eliminate the practice. It provides that two types of intra-EU arbitrations may continue. First, cases concluded before the *Achmea* decision may be enforced. Second, cases pending at the time of the *Achmea* decision may be resolved through an amicable dispute resolution process. The process prescribed, however, removed much of the international character of the proceedings in favor of EU law. Mr. Leventhal projected that these policies are likely to be met by investors with challenges to their validity.

Unlike many that point to *Achmea* as a catalyst for shifting policies and attitudes within Europe, Mr. Leventhan argued that a weakening of the investor-state arbitration regime, in fact, began much earlier with the 2009 Lisbon Treaty, which vested within the European Commission sole authority over external European Union trade. This was followed by initiatives aimed at weakening intra-EU investment agreements between EU member-states and lobby efforts to promote the establishment of an international investment court through UNCITRAL Working Group III.

Though the European Commission has taken a more active role in the investor-state dispute settlement, Mr. Leventhal pointed to several signs of opposing views amongst the individual member-states. Among these are those states that opted not to join the recent termination agreement and lobbying efforts by some states to exclude the Energy Charter Treaty (ECT) from that agreement. He also highlighted the German Constitutional Court's recent willingness to challenge a CJEU ruling as a

sign of states pushing back against the governing organs of the EU.[4] Though the UK is no longer a member of the EU, Mr. Leventhal opined that its decision to maintaining its bilateral investment treaties with EU member-states would make it an attractive option for those interested in investing in Europe. Finally, he acknowledged that many member-states do not appear to share the European Commission's appetite for establishing an international investment court and are likely unwilling to commit to a new multinational organ at a time of rising populist movements domestically.

## VI. CONCLUSION

Unquestionably, international commercial and investment arbitration have recently experienced significant challenges and changes, largely catalyzed by government policies. The recent paring back of investor protections and arbitral remedies under the USMCA and the dissolution of intra-EU BITs evidence a growing mentality among state actors to disfavor the traditional mechanisms of dispute resolution. This approach, however, ignores the core purpose of those mechanisms—to encourage foreign direct investment and international commerce. In stripping away the protections and neutralities offered by treaty-arbitration, state and regional actors are limiting their competitiveness in the international marketplace and, ultimately, harming their own interests.

Contrary to investor-state arbitration's current trend, international commercial arbitration has largely embraced the challenges of the moment. Both practitioners and institutions have readily adapted to the constraints of state-imposed lockdowns and travel restrictions by embracing the use of virtual hearings. However, there remain valid concerns over the use of this novel technology and practitioners' ability to adapt existing practices to new environments, many of the pandemic era features—particularly those that allow for cost and time savings—are likely to persist beyond the virus' threat.

[4] BVerfG, Judgment of the Second Senate of 5 May 2020 - 2 BvR 859/15, http://www.bverfg.de/e/rs20200505_2bvr085915en.html; *see also* Michael Huertas et al., *German Federal Constitutional Court issues ultra vires verdict on ECB's bond-buying program on grounds of ultra vires*, https://www.jdsupra.com/legalnews/german-federal-constitutional-court-63761/#footnote1 (May 12, 2020).

As the international arbitration community stands at the threshold of the post-COVID, post-*Achmea* era, questions remain as to the longevity of investor-state dispute settlement and what shape future commercial matters will take. The only certainty is that the crucible of this moment will forge a new arbitration species, one that will be defined just as much by its stakeholders as by government action. Though it is not possible to vaccinate against the attitudes underlying *Achmea* or the risk of future large-scale disruptions, there is room for optimism that international arbitration will flourish in the coming years, as tools for promoting cost and time efficiency become more accepted and participants embrace adaptability.

**J. BRIAN JOHNS, ESQ., LL.M.** is an attorney with the United States Federal Judiciary. He previously worked as a Director for the International Centre for Dispute Resolution-ICDR. Brian holds a juris doctorate from Rutgers Law School and a LLM in International Legal Studies (specializing in international arbitration, international business law, and international organizations) from American University, Washington College of Law.

# A WEEK WITH JOSÉ ASTIGARRAGA
# AN INTERVIEW CONDUCTED VIA ITAFOR

*Compiled, edited, and translated by* Abel Quezada Garza & María Lilian Franco

## I. INTRODUCTION

In August 2020, the ITA Latin American Arbitration Forum (ITAFOR) launched a series of interviews with the most prominent arbitration practitioners working in the region. The first of the series was with José Astigarraga, global head of Reed Smith's international arbitration practice.

José is a founder of ITAFOR and renowned in Latin American arbitration, being ranked by Chambers International as top band for Latin America as well as for the United States. He also serves on the International Chamber of Commerce's Commission on Arbitration and ADR and has chaired the IBA's Task Force on the Guidelines for Arbitrator Conflicts of Interest.[1]

The interview was moderated by Elina Mereminskaya, partner at Wagemann Lawyers & Engineers in Chile and co-managing editor of the *ITA Arbitration Report*. The interview lasted five days and was opened to all ITAFOR members.

The interview was originally conducted in Spanish. This is a compilation and translation on this fascinating interview.

## II. THE INTERVIEW

**ELINA MEREMINSKAYA:** Members of ITAFOR, I welcome you all to a special activity that the forum has allowed us to develop: the series of interviews and interactions with leading arbitration practitioners.

José, thank you very much for accepting the invitation and being available to share with ITAFOR some of your experiences and thoughts. Let us get started then.

One of your favorite subjects is the art and science of persuasion. Why the interest?

[1] Int'l Bar Assoc., *Guidelines on Conflicts of Interest in International Arbitration*, https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx (2014).

**JOSÉ ASTIGARRAGA:** Let me start with a thank you for this honor. I have great appreciation for ITAFOR and the value it brings to our arbitration community. I hope that my comments in the next few days will serve to raise ideas that are of interest to members of the community and motivate discussion.

To your question, in a sense my interest in persuasion stems from the fact that fundamentally we, trial attorneys, make a living trying to persuade—we want three arbitrators to see the world from the vantage of our clients. If a one-liter bottle contains half a liter of water, then depending on my client's situation, I will want to convince the tribunal that the bottle is half full and my opponent will want to convince them that it is half empty. If we understand how human reasoning works, we can be more effective in persuading.

However, my interest is not as superficial as just wanting to win more cases. My interest is also based on a desire to maximize the chances that decisions are fair. We suffer from errors that are programmed into our reasoning processes—our software—that sometimes lead us to wrong decisions without realizing. We all know that two plus two equals four. Why is it then that from time to time our brains tell us that two plus two equals five? It turns out we suffer from biases that cause our reasoning to fail. For instance, sometimes bias take the form of mental blinders that, without realizing, do not let us see what is there and cause us to only perceive something else.

I have experienced it myself. For example, arbitrators are affected by confirmatory bias, which leads them to perceive only the evidence that matches their understanding of the case and ignore what goes against it. Once that bias is triggered, a party faces the challenge of "un-convincing" the arbitrator of the point of view he or she has formed that does not allow assimilating the evidence objectively.

My message is simple: science validates that human reasoning is more imperfect than we thought. Read "Thinking, Fast and Slow" by Kahneman.[1] For an

[1] Daniel Kahneman, Thinking, Fast and Slow (2013).

arbitrator to fulfill its role of administering justice, we must work to eliminate the errors that plague the computer systems in our heads.

**GUIDO TAWIL:** Good afternoon, everyone. First, I congratulate ITAFOR for having this interview program and, particularly, for starting with José. They could not have chosen a better interviewee to start the series.

Those of us who know José know that he stands out for several qualities, many of which already manifested in his first response. José is also characterized by his humility. For those who do not know, José created this forum today known as ITAFOR. Several of us supported his initiative but without José's original idea and the decisive support of ITA, this project would not have existed.

José, you rightly mentioned the effort that attorneys must exert to convince arbitrators, who have developed their own opinion, to reverse their initial perception. The task of the lawyer is clear. My question is: what should arbitrators do when that perception is generated? It is easy to say, "you should keep an open mind" and we all certainly try, but how far is that possible? In theory, we could all say that we do not decide until we have studied all the factual and legal arguments, but is that true? Is it possible for an adjudicator to re-examine his or her judgment *de novo*?

**JOSÉ ASTIGARRAGA:** I begin with the premise that for now it is impossible to eliminate all the defects in our "computer programs." But, just as programmers gradually eliminate computer errors, there are measures we can take to reduce the effect of our biases.

For example, authority bias—that affects the movement to diversify arbitral tribunals with more women and younger practitioners—causes us to defer and place faith in figures who hold "authority." Authority can be defined by title, experience, reputation, etc. In a tribunal with an arbitrator with great reputation and many years of experience and another that is fully qualified yet without the same gravitas, the process can easily become unbalanced. If care is not taken, the statesman arbitrator can dominate the deliberations and process. And authority bias operates subconsciously, so as not with ill intention.

What can be done? The president must take rein and ensure that bias does not affect the process. For example, at partner meetings at Astigarraga Davis, partners expressed their views in reverse order of experience. That is, from the youngest to the most experienced. If we gave an opinion in order of experience (from most to least), the entire discussion would have already happened by the time the young members give their opinion. Likewise, it is incumbent on the president to ensure that all opinions and ideas are duly considered.

There are other techniques as well. I give you an analogy. When I started practicing, there was no autocorrect. The task of proofing long briefs was a tedious exercise. Depending on time and length, the moment came when you no longer could "see" the errors. One way to break that syndrome was to read the document from the "end"—starting with the last word. That made it easier to identify errors because our brains were not anticipating the meaning of the sentence and could focus on the individual words. I think that kind of idea can be applied to arbitration as with counterfactual thinking. In that process, one endeavors to imagine other ways in which the situation in question might have unfolded besides the one you believe occurred.

Counterfactual thinking is useful, for example, to resist hindsight bias. This bias occurs because knowing that a situation has already happened can cause us to foreclose the possibilities of what truly existed. Counterfactual thinking is the exercise of identifying other possibilities, which can help put the true probability of the occurrence in perspective.

Another technique is to evaluate the logical chain by which we reach a conclusion, link by link. Sometimes we discover that we missed a link because we had already formed the conclusion. Anyway, to put my comments in a current context, we do not have a vaccine against biases, but there are already some techniques—in effect, arbitral masks—that can help reduce chances of exposure.

**ELINA MEREMINSKAYA:** José, you have just led the ICC working group on how to improve the evidentiary value of testimonial evidence. What lessons can you share with us?

**JOSÉ ASTIGARRAGA:** I have two interesting points. The first is that the project starts from the principle that, for a dispute resolution system to serve its function and satisfy end users, the system must render decisions that are adequately based on the facts. In other words, the system will not be satisfactory if users feel the results do not align with the facts. In that sense, arbitrators are like archaeologists—they must determine what happened in the past using clues and information provided long after the event. If that information is wrong or does not reflect what actually happened, it creates a risk that the tribunal will reach an erroneous conclusion—erroneous for not being based on what actually occurred.

It turns out that the conventional way witness evidence is prepared in international arbitration today may weaken the value of that evidence; it increases the risk that the result (award) does not reflect what in fact happened. For example, we have psychological studies showing that information acquired after the fact can contaminate and change memory. There is a striking example: President George W. Bush said he saw on television when the first plane crashed into the World Trade Center.[2] But, of course, that is not true. September 11 started as a normal day, and no one was filming the tower when the first plane crashed. So, what happened? The overflow of information that he received in the months that followed contaminated his memory to the point he believed he had seen something that in fact he had not.

The same can happen in our proceedings. During interviews and meetings, especially joint meetings with various witnesses, we can contaminate their memories. That creates two risks. First, the tribunal does not get an accurate account of what happened. Second, if during cross-examination it is shown that the witness's testimony is false, the rest of the testimony loses value despite being true, or worse, it appears that the witness is lying. Along these lines, one of the observations of the report is that arbitrators should educate themselves on how memory works to better assess witness evidence. The working group presented a series of recommendations on how to improve the practice.

[2] *See* 911facts, https://www.911facts.dk/?p=7532&lang=en (providing a full discussion about President Bush's statements).

**ELINA MEREMINSKAYA:** And what is the second point?

**JOSÉ ASTIGARRAGA:** Elina, what struck me the most is that no matter how much we talk about the convergence of practices in international arbitration, there are still substantial differences. Members of the task force came from all over the world. We conducted a survey on their practices regarding witness evidence. Some members considered that testimony is necessary only if there is no documentary evidence or the testimony contradicts the content of a document.

In effect, they start from a premise that documentary evidence is worth more than witness evidence. However, I have had cases where the counterpart has sent letters to my client and my client, out of fear of enraging the counterpart (a state), has not answered them properly. Later, in the arbitration, he had to explain (through witness evidence) that what was stated in his responses was not true. In the school of thought I describe, witness evidence would be disregarded or discarded upfront. Other members argued that documents simply reflect the perceptions of the authors about the facts, and in some cases the "documents" have been prepared precisely in anticipation of arbitration. In this school of thought, documents are worth no more than witness evidence.

One of the working group's recommendations was that there should not be a predisposition that documents have more value than witness evidence. The key word here is "predisposition". This does not mean that, in a particular case, a document is not effectively more reliable than a witness statement.

Another discussion was whether to allow witness preparation. Some suggested that the value of testimonial evidence increases if attorneys prepare witnesses. Others believed that witness preparation should not be allowed. Others favored strict control of witness examination by the tribunal, and others preferred to minimize the role of the tribunal. It was challenging to reconcile the differences, but in the end, we generated a list of useful recommendations for all schools of thought.

**ELINA MEREMINSKAYA:** José, you pointed out that "arbitrators should educate themselves on how memory works to better assess witness evidence."

What were the main lessons for improving the probative value of witness evidence? This is a particular challenge in the world of civil law What can attorneys do from their side, to better transmit the value of witness evidence to the arbitral tribunal?

**JOSÉ ASTIGARRAGA:** Very good question. The group came up with a long list of tools and tips, and the ICC is scheduling an event for its launch, but here are a few:

*First*, interview witnesses individually if possible. I have had situations where I had to interview my clients' teams collectively. Sometimes the group leader is strong-willed and somewhat defensive about the incident in question. If we do not keep a tight grip, that leader can dominate the meeting and the perspectives of the rest of the team.

*Second*, ask questions in a neutral way. We have studies showing that the answers to questions depend on how the question is phrased. If we ask: "How fast was the car going when it hit the other one?" This formulation tends to give us a higher speed perception than if we ask: "How slow was the car going when it ran into the other one?"

*Third*, put witnesses at ease and encourage them to give an accurate account of the events. Sometimes witnesses feel they must testify in a certain way or that it is not advisable to express their genuine opinion. Explain to them that it is perfectly normal not to remember something or say you do not know. Otherwise, again, there is a risk that clients and lawyers do not have all the necessary information to assess the risks of the case adequately, a correct account does not reach the tribunal, or the witness testimony is impugned during cross-examination.

*Fourth*, take steps to minimize distortions to witness memory. In-house attorneys are often the "first responders" when a dispute arises and therefore can take steps to mitigate distortion by obtaining the witness' account as soon as possible.

There are many other tools, including some for arbitrators.

**ELINA MEREMINSKAYA:** José, you have been handling international cases in Latin America for years. At the same time, you also handle matters in the United

States. What have you learned while working in those two systems that may be relevant to the ITAFOR community?

**JOSÉ ASTIGARRAGA:** Perhaps the most interesting is the need to adjust the mental "chip" depending on the system. For example, I have an arbitration case of several hundred million dollars that is being held in a national arbitration center in a Latin American country with a very strong procedural tradition. It is a long-term contract and the dispute concerns whether the force majeure clause excuses the breach. My client is a US company with in-house lawyers trained in common law and there is local counsel assisting as well.

The two teams see the dispute in very different ways. Local counsel relies on and emphasizes technical and procedural legal arguments, affirming the importance of law and the manner in which local arbitrators will decide. The US team recognizes the importance of those arguments, but the difference—and it is a substantial difference, is one of emphasis. For them, the facts must prevail, and the main task is to demonstrate to the arbitrators that it would be unfair to decide against the company. Both teams recognize the importance of the other arguments but give them less importance, priority, and emphasis. The art is in knowing how to reconcile these two conflicting perspectives. That is just one example—I deal with these mental "software" differences regularly in the course of my practice.

Especially in international arbitration, where arbitrators come from different cultures and traditions, the technical and procedural legal arguments are very important, but it is also critical to establish the second "because." Not the second "why"—the second "because".

I studied with a very distinguished professor in the US, Soia Mentschikoff. She explained that important court decisions usually have two "because's." The first is the legal justification—the judge decides based on the law; she decides in your favor because the law supports your claim. But usually there is a second "because." The first "because" is the justification for the result, but the second "because" is what motivated the decision. That motivation can be the judge's sense of justice, or opinion about the effect the decision can have on society, or her philosophy of life, as well as,

sometimes, negative motivations such as biases and prejudice; the judge decides in your favor because it is also "right."

It is key to understand, and sometimes supply, the second "because." In my case, the US team seeks to satisfy the arbitrators of the second "because," arguing the injustice that would result for finding against the client given the parties' behavior. I believe the second "because" is key no matter the nature of the arbitration.

**HENRY VEGA PRECIADO:** Notwithstanding the difference between the two systems, I ask whether the "second because" is an appeal to equity (with the risk of imposing a subjective criterion).

**JOSÉ ASTIGARRAGA:** There is always that risk. Yesterday at a conference organized by Alfredo Bullard and Huascar Escurra, a participant asked if arbitrators allow themselves to be influenced by emotions. Huascar explained that he considers "fundamental to be able to cause that emotion in the tribunal because it is when you cause that emotion that you reach the tribunal's empathy for your client's story and get them to feel that your client's cause is the just cause that should prevail in the award." Arbitrators are humans with emotions. The "second because" is not simply an emotion. It can be a totally objective question (for example, the effect of the decision on society). However, in any case, remember that alongside the "second because" there is the "first because"—the legal justification that validates the result.

**ELINA MEREMINSKAYA:** For ten years you have been appointed as sole arbitrator, arbitrator, and president of arbitral tribunals. However, recently you have not accepted any more appointments. What was the motivation to stop serving as arbitrator?

**JOSÉ ASTIGARRAGA:** To a litigation attorney, the experience of serving as arbitrator is invaluable. You can see how arbitrators do their jobs. Even simple things, for instance, how to organize documents, how to reduce their workload, etc. Things that you do not think about until you are on the "other side of the table." But there are also more complex things, such as how the arguments are perceived, how to submit information in an effective manner, the relation between the tribunal and

witnesses, and the dynamic between the arbitrators. It was very useful being on that side of the table.

**ELINA MEREMINSKAYA:** But then why stop?

**JOSÉ ASTIGARRAGA:** It was more about what fulfilled me. During those years I was more focused on the biases and persuasiveness. I enjoyed the ability to apply the things I was discovering as an attorney. I taught courses about cross-examination. Basically, I wanted to be Messi and not the arbitrator of the game (I apologize to my Real Madrid friends).

Maybe you are aware that the slogan of my law firm was "the Power of Focus," and in accordance with that philosophy, I preferred to focus on my job as an attorney.

But now I am also interested in the developments that we can do "on the other side of the table." For instance, the ICC invited arbitrators to form a working group about memory performance. In Vienna, we presented a program about how arbitrators can tell if a witness is telling the truth and of course, how to control biases when you act as arbitrator.

**ELINA MEREMINSKAYA:** What do you think about "double hatting"?

**JOSÉ ASTIGARRAGA:** Your question is very appropriate. ICSID and UNCITRAL just published a draft code of conduct for adjudicators in investment arbitration.[3] Article 6 of the draft code seeks to limit arbitrators from acting as counsel and this provision will be mandatory for ICSID cases.[4]

Regarding double hatting, we must make a distinction between investment and commercial arbitration. In the commercial arbitration context, I do not see much of a problem with double hatting. In investment arbitration, many consider that both roles (counsel and arbitrator) are incompatible and create risks when performed at the same time.

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[3] *Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement*, https://icsid.worldbank.org/sites/default/files/Draft_Code_Conduct_Adjudicators_ISDS.pdf (hereinafter *Draft Code*).

[4] *ICSID and UNCITRAL Release Draft Code of Conduct for Adjudicators* ICSID (May 1, 2020), https://icsid.worldbank.org/news-and-events/news-releases/icsid-and-uncitral-release-draft-code-conduct-adjudicators.

For instance, in investment arbitration there are certain principles that are repeatedly addressed (expropriation, fair treatment, denial of justice, etc.). One fear is that a counsel acting as arbitrator in an investment case could solve the case with the aim of benefiting his client in another case.

Some people differ. Some weeks ago, our team presented a program on the code of conduct with Meg Kinnear, the ICSID Secretary-General, Juan Fernandez Armesto, Lucy Reed, and Tom Sikora, among others.[5] Both Juan and Lucy commented that there should be an absolute prohibition against "double hatting." Tom (by the way, the next president of the ITA), in-house counsel at Exxon, commented that the rule need not be absolute and advocated for a prohibition against acting as arbitrator and counsel simultaneously with regards to the same measure.

There are also other considerations involved. Prohibiting arbitrators from also practicing as counsel creates economic challenges for those who do not have enough work as arbitrator yet. In those cases, even if they are very experienced arbitrators, only those with enough workload will be able to accept appointments. Why does this matter? This affects the possibility of filling tribunals with more women and younger practitioners.

**ELINA MEREMINSKAYA:** José, what is your advice to the young practitioners on ITAFOR?

**JOSÉ ASTIGARRAGA:** I have two. First, do something you are passionate about. There is a quote: "Do something you love and you will never work a day in your life." Life is too short to do things that do not fulfill you. When I would interview young attorneys for a position at Astigarraga Davis, I told them the story of the three bricklayers:

> Once there were three bricklayers. Each one of them was asked what they were doing. The first man answered gruffly, 'I'm laying bricks.' The second man replied, 'I'm putting up a wall.' But the third man said enthusiastically and with pride,

[5] *Draft Code*, *supra* note 5, at 16 ("Adjudicators shall [refrain from acting]/[disclose that they act] as counsel, expert witness, judge, agent or in any other relevant role at the same time as they are [within X years of] acting on matters that involve the same parties, [the same facts] [and/ or] [the same treaty].").

'I'm building a cathedral.'[6]

I explained to the candidates that we were looking for cathedral builders. Find something that makes you feel like you are building cathedrals.

The second is be great lawyers. I am delighted that I started my career in the best law firm in Florida in those days. One of the main partners was an extraordinary business creator for the law firm. Young lawyers asked him for advice on how to attract clients. He said, "Become excellent lawyers." We felt disappointed and thought: who does not know we have to be excellent lawyers? But what Louis explained is that before we can speak of all the rest, of how to attract clients, you need to have domain of the law and "craft" of lawyering. Throughout the years I realized that he was right.

## III. CONCLUSION

**JOSÉ ASTIGARRAGA:** I have enjoyed the exchange of ideas and the interventions of so many friends. Thank you for the opportunity to share this week with you.

Elina and ITAFOR--congratulations for the excellent work you have done so that our arbitration community can communicate with the aim of strengthening arbitration in our region.

**ELINA MEREMINSKAYA**: José, thank you very much for accepting the invitation to do the first interview of its kind in ITAFOR. Thank you, above all, for being with us throughout the five days, for sharing your ideas with such generosity, and for encouraging reflection at ITAFOR.

We express our infinite appreciation for José and thank the ITAFOR community and members for their participation in this initiative.

**MARÍA LILIAN FRANCO** focuses her practice on international arbitration and has experience on telecommunications, energy and corporate law as an associate at Aguilar Castillo Love. She holds an LL.M. in International law and foreign trade from ISDE Law and Business school in Spain and a law degree from Universidad Francisco Marroquin in Guatemala.

[6] Reed Smith LLP, *ICSID/UNICITRAL Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement*, YOUTUBE (July 27, 2020), https://www.youtube.com/watch?app=desktop&v=_9BkcA51aAw.

**ABEL QUEZADA GARZA** is a Mexican lawyer working as an associate at del Castillo & Castro Abogados in Monterrey. His practice area focuses on civil and commercial litigation, international arbitration matters and alternative dispute resolution methods. He has experience in domestic and international arbitration proceedings, under the Arbitration Rules of the International Chamber of Commerce (ICC) and the National Chamber of Commerce of Mexico City (CANACO).

# DISCLOSURE AND CONFLICTS OF INTEREST – A RECAP OF A PRAGMATIC PANEL

*by Julie N. Bloch*

## I. INTRODUCTION

The Institute for Transnational Arbitration (ITA) and the Latin American Association of Arbitration (ALARB) co-hosted the first-ever virtual Americas Workshop from December 2, 2020, to December 4, 2020. The Workshop, titled *Arbitrators: Immunity, Conflicts and New Challenges*, was co-chaired by Julie Bédard of Skadden, Arps, Slate, Meagher & Flom LLP (New York & São Paulo) and María Inés Corrá of M.&M. Bomchil (Buenos Aires). The three-day conference included five panels, each focusing on various aspects of arbitrators' role and responsibility regarding the duty of disclosure, conflicts of interest, liability, and immunity. The conference also covered diversity in international arbitration and discussed how the arbitration community should promote diversity for both arbitrators and counsel.

I have chosen to discuss in more detail one specific panel titled *Disclosure and Conflicts of Interest*, due to its practical relevance for arbitrators and practitioners alike.

## II. THE KEYNOTE

The duty of disclosure has garnered particular attention lately, as exemplified by the Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement[1] and the revisions of various arbitral institutional rules to mandate the disclosure of a third-party funding agreement. In fact, the ICC recently unveiled its revised 2021

[1] *Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement*, https://icsid.worldbank.org/sites/default/files/Draft_Code_Conduct_Adjudicators_ISDS.pdf (hereinafter *Draft Code*).

Rules of Arbitration,[1] with Article 11(7)[2] now requiring parties to disclose a third-party funder's existence and identity.

The mandated disclosure of third-party funding is but one example highlighting an attempt to promote transparency in international arbitration and avoid conflicts of interest between the arbitrators and the parties in a proceeding.

In her keynote address preceding the *Disclosure and Conflicts of Interest* panel, Professor Catherine A. Rogers (Penn State Law School, University Park, and Queen Mary University, London) focused precisely on these conflicts of interest between arbitrators and parties, equating arbitrator conflicts to "moving targets." Prof. Rogers noted that arbitrator conflicts are constantly evolving (hence the "moving" part), but the definitions meant to clarify what is or is not a conflict are circular and incoherent. Considering this, Prof. Rogers posited the question of: how exactly can we—the international arbitration community—hit this "moving target"?

Prof. Rogers explained that part of the problem is a lack of clarity in terms of what is to be expected from an "independent" and "impartial" arbitrator. She pointed to a proliferation of sources all trying to define impartiality, including the first draft of the Code of Conduct for Adjudicators in Investor-State Dispute Settlement mentioned above.[3] These definitions, however, all miss the mark, according to Prof. Rogers, because absolute impartiality does not exist. Prof. Rogers went on to clarify that absolute impartiality is not only impossible but is also undesirable. A party cannot ignore or deny evaluating the particular education, experience, or even political perspectives of a potential arbitrator prior to his or her nomination. Prof. Rogers underscores that parties choose a potential arbitrator because of these particular perspectives; however, the use of binary terms to define impartiality and

[1] ICC Rules of Arbitration (2021), https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/#article_17 [hereinafter ICC Rules of Arbitration].

[2] ICC Rules of Arbitration, art. 11(7) ("In order to assist prospective arbitrators and arbitrators in complying with their duties under Articles 11(2) and 11(3), each party must promptly inform the Secretariat, the arbitral tribunal and the other parties, of the existence and identity of any non-party which has entered into an arrangement for the funding of claims or defences and under which it has an economic interest in the outcome of the arbitration.").

[3] *See supra* note 1.

independence completely ignores this fact or the inevitable truth that bias is indeed inherent to all humans.

For her the question is therefore not whether there is bias (the answer is quite obviously, yes), but rather which kinds of bias are appropriate when analyzing arbitrator conflicts—a question that is much more nuanced. Deciding which kinds of bias are appropriate and qualify as arbitrator conflicts is further complicated by the emergence of relatively new types of conflicts, such as "double hatting" and "issue conflicts".

Prof. Rogers observed that these "moving targets" are also "shared targets" as we work towards reducing unsuccessful arbitrator challenges, even the ones made in good faith. A better understanding of these "moving targets" can be achieved through various mechanisms, all aiming to increase transparency. The focus should be on allowing parties to be better informed when selecting the "right" arbitrator for a particular dispute. One such mechanism can be found at the institutional level, with arbitral institutions embracing their role as de facto regulators of arbitrator challenges. Indeed, arbitral institutions, as well as private and commercial sources, could all help resolve the formalistic impartiality problems and lack of strict regulation that Prof. Rogers criticizes. Prof. Rogers concluded her keynote address by explaining how the reinforcement of these "shared targets" will increase legitimacy in international arbitration, both actual and perceived.

## III. THE PANEL

Following this dynamic keynote address, the *Disclosure and Conflicts of Interest* panel began, moderated by Sandra González of Ferrere (Montevideo) and featuring Claudia Salomon of Latham & Watkins LLP (New York), Eduardo Damião Gonçalves of Mattos Filho (São Pablo), and Professor Guido Santiago Tawil (Independent Arbitrator, Buenos Aires).

Prof. Tawil started sharing a few remarks on the current state of international arbitration regarding conflict standards and transparency. For Prof. Tawil, the root of the problem is figuring out what exactly should be disclosed to attain the required standard of transparency. A certain balance must be achieved between what is and

is not reasonable for disclosure obligations. Without such balance, excessive disclosures will inevitably give rise to unfounded and frivolous challenges, turning disclosure into what Prof. Tawil qualifies as "scrutiny." He posited that this balance, and thus the mandated standard of transparency, can be achieved by focusing on the disclosure of issue conflicts. The disclosure of issue conflicts can, in turn, be achieved by following the current IBA Guidelines and applying an objective standard (i.e., whether a reasonable person with knowledge of the relevant facts and circumstances would have justifiable doubts as to an arbitrator's impartiality).[4] Prof. Tawil comments that the UK Supreme Court recently applied this same objective standard in *Halliburton Company v. Chubb Bermuda Insurance Ltd.*[5] Under English law, the Court held that determining whether there is apparent or perceived bias depends on whether a "fair-minded and informed observer" would conclude that there is a "real possibility" of bias.[6]

Prof. Tawil argued that the arbitration community needs to approach matters of disclosure and transparency with realistic and practical solutions. There seems to be a disconnect between the current written requirements and codes of conduct, which are fine in theory but are wholly disconnected from international arbitration realities today.

Mr. Gonçalves expanded on this argument by explaining that a potential arbitrator will be judged five years from now on something he or she did today, but under the standards in force five years from now. For him, the arbitration community should avoid drafting and enacting more and more rules. Trying to have theoretical rules keep up with the practical realities of modern international arbitration will only lead to an endless (and fruitless) struggle. Instead, Mr. Gonçalves advocates for flexibility based on the evolution of conflicts of interest and disclosure obligations.

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[4] Int'l Bar Assoc., *Guidelines on Conflicts of Interest in International Arbitration*, https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx (2014).

[5] Halliburton Co. v. Chubb Bermuda Insurance Ltd. (formerly known as Ace Bermuda Insurance Ltd.), [2020] UKSC 48.

[6] *Id.* at ¶ 39; *see also* ¶¶ 54-55.

Ms. Salomon, on the other hand, suggested that the parties should drive the need or expectations for increased transparency. She further explained that parties often get caught up in the definitions of independence and impartiality, which leads to parties becoming overly preoccupied with what exactly must be disclosed. Our expectation and understanding of disclosure obligations should not be so rigid. As Ms. Salomon observed, the ICC's Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration includes an enumerated list of what should be disclosed; however, this list is open-ended ("including but not limited to").[7] There is thus some guidance as to what should be disclosed without attempting to identify every possible conflict of interest scenario.

Ms. Salomon recommended—and Prof. Tawil and Mr. Gonçalves agree—that the arbitral community should avoid endlessly debating the specifics of a particular definition and instead focus on providing clarity on disclosure obligations. Once a disclosure is made, determining whether that specific disclosure is a basis for a challenge depends on the facts and circumstances of the case at hand.

For Mr. Gonçalves, a parallel can be drawn between the above discussion and the famous phrase of Justice Potter Stewart in *Jacobellis v. Ohio*: "I know it when I see it."[8] In other words, when there is a true lack of independence or impartiality, arbitration practitioners will be able to see it and take the necessary steps to remedy the situation.

The panel discussion then turned to identifying tools or measures that are of particular value when addressing independence and impartiality, particularly impartiality. In Ms. Salomon's view, the revised 2021 ICC Rules of Arbitration offers a new and important tool. Under Article 17(2), arbitrators may now "take any measure necessary to avoid a conflict of interest of an arbitrator arising from a change in party representation, *including the exclusion of new party representatives from*

[7] Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration (2021), ¶. 27, https://iccwbo.org/content/uploads/sites/3/2020/12/icc-note-to-parties-and-arbitral-tribunals-on-the-conduct-of-arbitration-english-2021.pdf.

[8] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

*participating in whole or in part in the arbitral proceedings*."[9] Article 17(2) addresses a situation that may not have been considered in the past: a party bringing in new counsel as a guerilla tactic. The new counsel is brought in with the express intention of creating a conflict with an arbitrator, resulting in a disclosure, challenge, and eventual resignation. Article 17(2) of the revised ICC Arbitration Rules therefore grants arbitrators the power to appropriately respond to such conflict issues, if they arise.

Mr. Gonçalves believes that confidentiality has been overrated in international arbitration proceedings. He elaborates that this was addressed by the ICC under the leadership of Alexis Mourre with the introduction of three new measures: 1) the publication of awards; 2) the publication of the composition of newly constituted ICC tribunals and the counsel who will partake in these new cases; and 3) the ability to obtain the reasoning behind a challenge decision if requested by the parties. According to Mr. Gonçalves, these three measures will help eliminate the "veil of secrecy" surrounding conflict issues.

Though Prof. Tawil agreed with both Ms. Salomon and Mr. Gonçalves regarding the importance of these tools in promoting transparency, he warned against the risk of overpublicizing and jeopardizing the private nature of international arbitration proceedings. This brought up an interesting point of discussion: how do we efficiently use these disclosure tools to address impartiality while simultaneously avoiding the perils of over disclosure?

Prof. Tawil noted that some of these disclosure services go beyond what is necessary to assess potential conflicts, for example, by inquiring on an arbitrator's position on document production. Prof. Tawil believes that arbitrators cannot and should not comment on such types of questions because arbitrators (like judges) should not speak about their decisions other than through their judgments.

Ms. Salomon further added that the arbitral community must trust that the user of these disclosure tools will be able to properly assess the gathered information based on what it provides. In her opinion, the institutions as the *de facto* regulators

[9] ICC Rules of Arbitration, art. 17(2) (emphasis added).

should provide participants with sufficient information to better understand specific arbitrators, while respecting the level of confidentiality set by the parties.

The panel concluded with a discussion on self-regulation. More specifically, whether self-regulation by arbitrators is preferred over more formal standards, such as a global code of conduct or a regulatory body with the ability to sanction arbitrator conduct. Both Prof. Tawil and Mr. Gonçalves are in favor of self-regulation and find strict and formal standards undesirable. Both agree that these formal standards detract from the very basis of arbitration, removing the flexibility that differentiates it from court proceedings.

In Ms. Salomon's view, it is once again up to the parties to decide if more formal standards are needed. As such, only time will tell if there is to be increased demand for additional guidelines or codes of conduct addressing conflicts and disclosure obligations.

**JULIE N. BLOCH** is an international arbitration associate at B. Cremades y Asociados. She focuses her practice primarily on international investment treaty and commercial arbitration matters, serving both as assistant to the arbitral tribunal and counsel. Julie holds a J.D. from Cornell Law School with a specialization in International Legal Affairs and a concentration in Public Law, as well as an LL.M. in International Legal Studies from New York University (NYU) School of Law.

# A REPORT ON THE PANEL "ONLINE ARBITRATION HEARING: ETHICAL CHALLENGES AND OPPORTUNITIES"

*by* Ernesto M. Hernández

## I. INTRODUCTION

The ITA Workshop, held in Dallas on the third Thursday in June every year since 1989, is widely recognized as the leading conference in the field in the US. As one participant summarized: "It is the forum in which legitimate top practitioners gather annually. Thus, the topics are sophisticated, the networking is legitimate, and the social element is valuable." The Workshop now begins on the preceding Wednesday afternoon, with membership meetings and activities continuing into the following Friday.

With the world turned upside down by the pandemic in 2020, the ITA completely revised the Workshop's originally planned program to better suit the online format.

In its 32nd edition, the Workshop was an innovative online event hosting many participants.

The *Online Arbitration Hearing: Ethical Challenges and Opportunities* panel discussion addressed ethical challenges and opportunities relating to online arbitration hearings. The panelists were Sylvia Noury (Freshfields Bruckhuas Deringer LLP, London) who was the moderator, and Gabriel Costa (Shell Brasil Petróleo Ltda., Rio de Janeiro), Laurence "Larry" Shore (BonelliErede, Milan), Carlos Lapuerta (Brattle, London), Lucy Reed (Arbitration Chambers, New York), and Elie Kleiman (Jones Day, Paris). The panel of experts included diverse perspectives from in-house counsel, party representatives, an expert witness, and members of the arbitral tribunal. The panelists discussed six topics related to ethical challenges and opportunities with online arbitration hearings.

Setting the stage for the panel discussion, Ms. Noury commented that, in general, the arbitration community is ready to embrace the changes and seize the opportunities presented with virtual hearings.

## II. TOPIC 1: DUE PROCESS CONCERNS WITH VIRTUAL HEARINGS

Ms. Noury noted that concerns with virtual hearings are normally centered on concerns of due process. She inquired whether virtual hearings put prejudicing pillars like equality of arms, legitimacy of the process, and due process at risk. Ms. Noury also questioned whether virtual hearings might cut against parties' expectations when entering into an arbitration agreement, particularly in long running or highly charged disputes.

From an arbitrator's perspective, Ms. Reed considered that virtual hearings will lead to new categories of illegitimate (or unsupported) abuse of due process claims and challenges, possibly weakening the foundational importance of due process. Abuse of due process claims would be used as a strategic "sword" rather than a "shield." For example, a party or its counsel would argue that a virtual hearing violated Article V(1)(B) of the New York Convention because it was unable to present its case.[1] Ms. Reed noted a few examples such as occasional internet problems (as opposed to systematic internet access problems), "Zoom fatigue" affecting counsel's performance, or a stalling party preventing the opposing party from presenting its case. As an arbitrator, she has already heard about access to the internet and electricity issues. Arbitral tribunals will need to be vigilant and prepared to press a party for its reasoning when raising due process concerns. She recognized that there might be instances when cases cannot be heard virtually without raising due process concerns (such as where the law of the seat prevents or prohibits virtual hearings, where witness testimony is critical, or where issues of fraud are to be discussed). Ultimately, arbitrators will have new challenges in the era of virtual hearings, and these challenges will be distinct from those driven by "due process paranoia." Nonetheless, Ms. Reed hopes that the legitimate protections of due process will remain protected.

From an in-house counsel's perspective, Mr. Costa stated that there is likely no reasonable due process expectation that hearings be held in-person, absent express

[1] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, art. V, 330 U.N.T.S. 38, 7 I.L.M. 1046.

language in the parties' arbitration agreement. Although parties have taken for granted that hearings are held in-person—an expectation likely stemming more from practice than actual rules—parties will approach virtual hearings the same way they approach other procedural and strategic aspects of a dispute. Mr. Costa also predicts that while virtual hearings present opportunities for parties to contribute to "due process paranoia," this trend will not persist, as parties, party representatives, arbitrators, and arbitral institutions will begin raising and addressing these issues early in the proceedings.

From a party representative's perspective, Mr. Kleiman added two factors that both parties and tribunals must consider. First, although it is presumed that parties and law firms are open to virtual hearings and have access to the necessary technology to conduct the virtual proceedings, it is still unclear whether there is equal access to technology or equality in actual practice training. He predicted that parties would face additional evidentiary challenges proving that they could not present their case because, for example, they lacked the necessary access to technology. Mr. Kleiman noted that the arbitration community would have to accept that the future challenges to arbitration awards remain unclear. Second, Mr. Kleiman also believes that the human nature of arbitration is a factor to be considered. Members of the tribunal are selected and appointed because parties and counsel think highly of their independence and intellect and because parties and counsel value time spent in the same room. This human nature of arbitration remains present even in a virtual world.

## III. TOPIC 2: CONDUCT OF ALL PARTICIPANTS—TRIBUNAL, PARTIES, COUNSEL, AND WITNESSES

Some argue that the advocacy style of counsel may suffer from virtual proceedings. Others think that virtual proceedings help eliminate some of the unnecessary theatrics of arbitration hearings. Ms. Noury queried whether virtual hearings would make proceedings more civilized or, conversely, would aid unethical behavior.

According to Mr. Costa, there will be a revitalization of ethical standards and codes of conduct in the virtual space, noting that several aspects of a virtual

arbitration process may require so. First, arbitral tribunals have been too reluctant to sanction parties acting in bad faith, not complying with procedural rules, or failing to abide by best practices. Second, the language of arbitration awards has caused some to discredit the arbitration process, particularly where the language in an award meant to "please" everyone actually "frustrates" everyone. Third, parties feeding the "due process paranoia" have led to a high tolerance of abuse without meaningful consequences from the tribunal. Ultimately, in Mr. Costa's view, virtual hearings present an opportunity for newer or stricter ethical rules and standards of conduct overall.

According to Mr. Kleiman, cooperation among participants is critical when conducting virtual hearings. Virtual hearings have contributed to greater cooperation among participants because they have already had to agree on new protocols—a development that will likely become more engrained systematically. Even so, Mr. Kleiman posited that what may be lacking is a rule where counsel, parties, and the arbitrators all recognize that cooperation is not only an expectation of arbitration but also an obligation that comes with the "arbitration package." Mr. Kleiman agreed that there is a need for more proactive arbitrators because when cooperation fails, arbitrators need to establish the organization and processes for virtual arbitrations,

Mr. Shore, on the other hand, is not concerned with parties' conduct during virtual hearings because arbitrators—taking command of proceedings early and implementing the appropriate systems—can address problematic behavior easily. For example, there may be fewer interruptions by identifying a principal speaker, implementing procedures for objections, or incorporating time for pauses so that advocates have an opportunity to confer with colleagues. In Mr. Shore's view, arbitrators may have to be less active with questions and be more organized internally from the outset of the proceeding. He also agreed with Mr. Kleiman that something more is needed in the virtual context, such as participants in an arbitration agreeing in advance to establish the duties to cooperate and to arbitrate in good faith.

## IV. TOPIC 3: EXAMINATION OF FACT AND EXPERT WITNESSES

Before returning to the panel, Ms. Noury observed challenges concerning to witness's credibility or the integrity of proceedings are often discussed.

From an expert's perspective, Mr. Lapuerta stated that in-person testimony might be preferable because virtual testimony makes it difficult for an expert to assess whether a tribunal follows and understands the testimony. Mr. Lapuerta observed that virtual hearings present avenues for experts to not give an appropriate context for their testimony, not answer questions, or not be truthful. With respect to these dynamics, he agrees that assessing body language is critical to establishing credibility. Mr. Lapuerta proposed that an expert be placed far enough from a camera so that the video image captures the expert's entire body. Mr. Lapuerta also noted that "hot tubbing" expert witnesses might restrain them from overstating a case. Lastly, tribunals will have to develop methods to prevent experts from avoiding or inappropriately refusing to answer questions by engaging in long speeches.

From a witness's perspective, Mr. Costa noted that virtual hearings had necessitated changes to witness preparation. Unlike experts who may have the opportunity to testify multiple times during the normal course of business, fact witnesses from large companies may testify only once. Mr. Costa also noted that changes to witnesses' environments also mandate a change in the preparation strategy. Whereas fact witnesses may react and perform differently at in-person hearings, virtual hearings present witnesses with the opportunity to testify from familiar environments. It is important that fact witnesses understand their roles in the proceedings and expectations so that they remain credible during cross-examination.

Mr. Kleiman agreed that it is necessary for a witness to feel the "heat" and understand the "responsibility of the moment" to ensure the integrity of the proceedings. For example, introducing a member of opposing counsel into the same room as the witness during testimony will remind the witness that (s)he is presenting evidence and must be truthful. Mr. Kleiman also suggested that another potential solution is to focus on examining only vital issues. With a narrower scope of

examination questions from the tribunal, arbitrations increase in efficiency and obtain quality testimony and evidence.

Ms. Reed added that while virtual proceedings may complicate witness cross-examination, a positive outcome of virtual proceedings is that tribunal members would likely focus more on the proceedings because their faces are on a screen.

## V. TOPIC 4: TECHNOLOGY

The panel next discussed the steps necessary to achieve an efficient virtual arbitration and the issues that increased use of technology may present.

From a party representative's perspective, Mr. Shore noted that speaking into a camera, the inability to read a tribunal's facial queues, and issues with video images affecting a tribunal's perception cause concern that the tribunal may not fully appreciate the evidence presented. He posited that a solution for this issue might be to tailor the use of technology to the aspect of the hearing. For example: presenting oral arguments over the telephone and conducting witness examination by video. A potential outcome of this approach is that tribunals may begin to place more focus on written arguments rather than oral arguments.

Ms. Reed added that another issue presented with the use of technology is that the participant is charged with the responsibility of ensuring security throughout a hearing. According to Ms. Reed, this topic needs to be discussed and decided prior to a virtual hearing. Ms. Noury also noted that this issue is important, especially given new data security regulations.

Mr. Lapuerta added that a pragmatic solution with technology and virtual witness cross-examination might be that a witness is distanced from the camera so that a witness's body is in full view and that the witness is provided with headphones and a microphone to preserve the volume of testimony.

Mr. Kleiman noted that arbitration participants must also account for the hidden costs associated with the increased use of technology. It may require that arbitral institutions subsidize technology costs or account for these costs in their rates.

## VI. TOPIC 5: ENVIRONMENTAL BENEFITS

Ms. Noury noted that virtual arbitrations present significant environmental

benefits and opportunities. There is a hope that these environmental developments will be implemented at the outset of arbitration proceedings moving forward. The panel discussed whether such benefits could endure beyond the pandemic.

According to Mr. Shore, there is a tremendous opportunity to reconnect the arbitration practice with the world, both virtually and in-person, and to contribute directly to environmental sustainability when arbitration participants know that the benefits will require tradeoffs. For example, there will be cultural tradeoffs with limited in-person interactions, and tradeoffs with virtual witness examinations. Even so, the greatest benefit of virtual hearings is the environmental impact.

As an arbitrator, Ms. Reed noted that she intends to be proactive about focusing on which parts of a dispute can be done virtually, even after the pandemic ends. With respect to efficiency, Ms. Reed noted that virtual hearings would cause arbitration practitioners to be more flexible and more creative about which portions of the proceedings can and should be held virtually. With increased flexibility, international arbitration may become more accessible to those participants who would otherwise not have been able to participate or attend hearings. She recognized that there are important due process and access to justice considerations tied efficiency and environmental sustainability issues.

## VII. TOPIC 6: THE NEW (POST-PANDEMIC) WORLD

Lastly, the panel addressed what the post-pandemic arbitration world would look like and what considerations parties should consider when deciding to what extent virtual proceedings should be incorporated into their cases.

Mr. Costa noted that when parties or counsel make procedural and strategic decisions, the decision should always prioritize a party's business interests, not simply legal interests, because the decisions have collateral consequences on a party's business. Mr. Costa also listed six factors parties and counsel should consider when determining whether and to what extent virtual proceedings should form part of an arbitration: (i) the selection of key witnesses and whether the witnesses should have full or limited exposure to the tribunal; (ii) where settlement is a viable option, whether in-person proceedings will facilitate opportunities to speak directly to

opposing parties to negotiate settlements; (iii) the difference in impact that demonstrative evidence will have in-person or virtually; (iv) costs; (v) the tribunal's willingness and comfort with virtual hearings and whether it would be prudent for the deciders of the case to be uncomfortable with the format of the proceedings; and (vi) whether all participants have appropriate and functioning technology.

From an arbitrator's perspective, Ms. Reed predicts that there will be greater use of semi-virtual arbitration proceedings, with the main factors being which portions of a conventional arbitration can be done virtually and fairly, more efficiently, less expensively, more securely and confidentially, and with a lower carbon footprint.

Mr. Lapuerta stated that he wishes that participants in virtual arbitrations could shift the zoom in their cameras while a witness testifies without the witness being able to control the function. Although the implementation of such technology may require additional costs, it may be an effective solution to concerns previously mentioned.

Mr. Kleiman recognized that because the arbitration community is in a transition period, solutions to these problems would not be perfect at first. Nonetheless, he is optimistic about the new mainstream for arbitration. Mr. Kleiman predicted that institutions would offer greater online dispute resolution options, whether through arbitration, mediation, or litigation.

Mr Shore noted two additional balancing factors to be considered by the parties and arbitrators when deciding to what extent online proceedings should be part of their case. He first mentioned, cross examination and whether the importance of cross-examination for the parties tend to indicate that in-person proceedings should be preferred over virtual proceedings. He then mentioned the arbitrator's ability to decide in cases in which—having seen one counsel in person and the other counsel only virtually—they consider appropriate to order that in-person proceedings may be more advantageous and fair.

## VIII. CONCLUSION

In her closing remarks, Ms. Noury expressed a positive outlook on the new normal. The new normal will involve new flexibility and a willingness to embrace virtual

proceedings into ongoing matters. The panel demonstrated that credibility, integrity, and excellent presentational skills would continue to shine in virtual settings.

**ERNESTO M. HERNÁNDEZ** is an associate at Norton Rose Fulbright US LLP. His practice focuses on international arbitration and commercial litigation. Ernesto holds a B.A. from Columbia University and a J.D. from Columbia Law School, where he was the Student Editor-in-Chief of the *American Review of International Arbitration.*

# INSTITUTE FOR TRANSNATIONAL ARBITRATION OF THE CENTER FOR AMERICAN AND INTERNATIONAL LAW

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The work of the Institute is done primarily through its Advisory Board, and its committees. The current practice committees of the ITA are the Americas Initiative Committee (comprised of Advisory Board members practicing or interested in Latin America) and the Young Arbitrators Initiative Committee (comprised of Advisory Board members under 40 years old). The ITA Advisory Board and its committees meet for business and social activities each June in connection with the annual ITA Workshop. Other committee activities occur in connection with the annual ITA Americas Workshop and throughout the year.

D. *Programs.*

The primary public program of the Institute is its annual ITA Workshop, presented each year in June in Dallas in connection with the annual membership meetings. Other annual programs include the ITA Americas Workshop held at different venues in Latin America, the ITA-ASIL Spring Conference, held in Washington, D.C., and the ITA-IEL-ICC Joint Conference on International Energy Arbitration. ITA conferences customarily include a Roundtable for young practitioners and an ITA Forum for candid discussion among peers of current issues and concerns in the field. For a complete calendar of ITA programs, please visit our website at www.cailaw.org/ita.

E. *Publications.*

The Institute for Transnational Arbitration publishes its acclaimed Scoreboard of Adherence to Transnational Arbitration Treaties, a comprehensive, regularly-updated report on the status of every country's adherence to the primary international arbitration treaties, in ITA's quarterly newsletter, News and Notes. All ITA members also receive a free subscription to ITA's World Arbitration and

Mediation Review, a law journal edited by ITA's Board of Editors and published in four issues per year. ITA's educational videos and books are produced through its Academic Council to aid professors, students and practitioners of international arbitration. Since 2002, ITA has co-sponsored KluwerArbitration.com, the most comprehensive, up-to-date portal for international arbitration resources on the Internet. The ITA Arbitration Report, a free email subscription service available at KluwerArbitration.com and prepared by the ITA Board of Reporters, delivers timely reports on awards, cases, legislation and other current developments from over 60 countries, organized by country, together with reports on new treaty ratifications, new publications and upcoming events around the globe. ITAFOR (the ITA Latin American Arbitration Forum) A listserv launched in 2014 has quickly become the leading online forum on arbitration in Latin America.

Please join us. For more information, visit ITA online at www.cailaw.org/ita.

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**A Division of The Center for American and International Law**

5201 Democracy Drive
Plano, Texas, 75024-3561
USA