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**PRESERVING PERSPECTIVES:
INTERNATIONAL ARBITRATORS IN THEIR OWN WORDS
GEORGE A. BERMANN**

by Anna Isernia Dahlgren

I. INTRODUCTION

On June 16, 2022 at the 34th Annual ITA Workshop and Annual Meeting in Austin, Texas, Andrea K. Bjorklund (Associate Dean of Graduate Studies, Full Professor, and the L. Yves Fortier Chair in International Arbitration and International Commercial Law at McGill University Faculty of Law, Montreal),¹ interviewed Professor George A. Bermann (Jean Monnet Professor of EU Law and Walter Gellhorn Professor, Columbia Law School, New York) for a continuing series of oral history interviews by the ITA Academic Council – the Preserving Perspectives Project: International Arbitrators in Their Own Words. The recording of the interview can be found at <https://vimeopro.com/user34174610/ita-oral-history-interviews/video/771638892>.

The Preserving Perspectives Project conducted its inaugural interview in February 2012, between the late David Caron² and Prof. Bermann. It is fitting, then, that the reprisal of Prof. Bermann’s interview take place ten years later in honor of Prof. Caron. It is similarly fitting that Prof. Bjorklund conducted the interview, as she was the first academic council member and chair to carry forward Prof. Caron’s vision of the Preserving Perspectives Project.

This article preserves the interview and contemplates Prof. Bermann’s impact on the field of international arbitration. First, it briefly introduces Prof. Bermann, before delving into the “manifest destiny” that led him towards arbitration. Next, it turns to one of Prof. Bermann’s most well-known accomplishments, the Restatement Project. It concludes with Prof. Bermann’s reflections on his career and on the field of arbitration. While this article does its best to convey the substance of the interview,

¹ To learn more about Prof. Bjorklund, *see* <https://www.mcgill.ca/law/profs/bjorklund-andrea>.

² David D. Caron was an international judge, arbitrator, and professor of law; he passed away in 2018. *See* <http://davidcaron.life/> for more.



Prof. Bermann's charm and wit—and many additional stories—do not translate well to text. It is highly recommended that readers take the time to watch the interview, too.

II. PROFESSOR BERMANN

George A. Bermann is professor of law and director of the Center for International Commercial and Investment Arbitration at Columbia Law School, as well as member of the faculty of the Ecole de droit, Sciences Po (Paris) and the Geneva LL.M. in International Dispute Settlement (MIDS). He has been an arbitrator in scores of international commercial and investment cases since 1985 under the aegis of most leading international arbitral institutions. He is head of the global advisory board of the New York International Arbitration Center (NYIAC), fellow of Chartered Institute of Arbitrators, founding member of the Governing Board of the ICC International Court of Arbitration (Paris), and head of the advisory board of the Thai Arbitration Center (Bangkok) and Center for International Investment and Commercial Arbitration (Lahore, Pakistan). Prof. Bermann is Chief Reporter of the ALI Restatement of the US Law of International Commercial Arbitration, co-editor-in-chief American Review of International Arbitration, and member of board of editors of *Revue de l'Arbitrage*. He co-authored (with the late Emmanuel Gaillard) the UNCITRAL Guide to the New York Convention and author of many books, book chapters, and articles on international dispute resolution – notably international arbitration.

III. “MANIFEST DESTINY”

Like many other giants in the field of international arbitration, Prof. Bermann did not plan on becoming a world-renowned arbitration practitioner. Even though his father was a small-town lawyer, he was torn between law, journalism, and architecture. Having strong programs in both law and architecture, Yale College was a natural choice. But eventually—once he became familiar with what law was and knowing his strengths and weaknesses to the point where he felt weaker in having what it takes to be a good architect—law won out.

Admitted to Yale Law School, Prof. Bermann became hooked on international law after taking the only available international law class, “Public Order in the World



Community,” taught by Myres McDougal³ and Michael Reisman.⁴ He also credits his “Conflict of Laws” course, taught by Louis Pollak,⁵ as putting him on the path to international arbitration.

After graduating from Yale Law School in 1971, Prof. Bermann took an associate position at Davis Polk & Wardwell in their litigation department, working on the case *Compagnie Financiere de Suez et de l’Union Parisienne v. U.S.*, 492 F.2d 798 (Ct. Cl. 1974). After four years at Davis Polk representing “world class corporate culprits,” Prof. Bermann decided to pursue his academic career. In explaining to Prof. Bjorklund why he left, he recounted a conversation he had with his wife, saying “this cannot be my manifest destiny. What if my whole career is like this and this is what I’ve built it up all for?” Doing the unthinkable, Prof. Bermann quit Davis Polk and obtained a two-year fellowship from Columbia Law School, in which the first year was spent studying either French or German law and teaching at Columbia, and the second year was spent in the chosen country.

However, in his first year of the fellowship, he was invited to join the faculty at Columbia, with the understanding that he would have to go to Germany after his year in France. So, in 1975, he worked at the Conseil d’État (French Supreme Administrative Court) in France, with the University of Paris, where he actively participated in deliberations as an intern. Then, he spent one semester learning German at the University of Munich and the next at the Max Planck Institut für ausländisches öffentliches Recht und Völkerrecht in Heidelberg.

After two years spent “swanning around Europe,” Prof. Bermann was faced with teaching at Columbia Law School. Although anxiety plagued him at first, he soon became comfortable, and now finds teaching exhilarating. He noted that he has yet

³ Myres McDougal was a Sterling Professor Emeritus of Law at Yale Law School and a renowned authority on international law; he passed away in 1998. See <https://news.yale.edu/1998/05/08/obituary-myres-smith-mcdougal-sterling-professor-emeritus-law> for more.

⁴ W. Michael Reisman is Myres S. McDougal Professor of International Law at the Yale Law School. See <https://law.yale.edu/w-michael-reisman> for more.

⁵ Louis Pollak was a dean at Yale Law School and a U.S. District Court judge. See <https://law.yale.edu/yls-today/news/judge-louis-h-pollak-48-former-yls-dean-dies-89> for more.



to find a field with students more passionate than those in arbitration and that the field is growing immensely.

Prof. Bermann was then invited to co-teach an International Litigation seminar with Henry deVries,⁶ who Bermann credits with introducing international arbitration to Columbia Law School along with Hans Smit.⁷ This led directly to his first arbitrator appointment. One of deVries' colleagues at Baker Mackenzie, Robert Davidson, nominated Prof. Bermann as a party-appointed arbitrator, in what Prof. Bermann now describes as a potential disclosure error due to deVries' proximity to the case. That case received the one of the first anti-arbitration injunctions addressed to the Tribunal from a Mexican court, leading Prof. Bermann to call it "unforgettable."

IV. THE RESTATEMENT PROJECT

Perhaps one of Prof. Bermann's more well-known accomplishments, the conversation turned to the American Law Institute's Restatement Project.⁸ He had gotten to know Carolyn Lamm,⁹ who was a member of the Council of the American Law Institute (ALI) and prevailed in her fight to get an international arbitration restatement. She approached him to be the Chief Reporter for the new International Commercial and Investor-State Arbitration Restatement, at which point he selected his co-Reporters: Catherine Rogers, Christopher Drahozal, and Jack Coe. Together, they spent twelve years on the project, identifying the role of courts over the life-cycle of an arbitration.¹⁰ Of course, Prof. Bermann, commented, the recent United

⁶ Henry deVries was a lawyer and Professor Emeritus at Columbia Law School; he passed away in 1986. See <https://www.nytimes.com/1986/09/25/obituaries/henry-p-devries-a-lawyer-and-professor-at-columbia.html> for more.

⁷ Hans Smit was a distinguished Columbia Law School professor and practitioner in international arbitration and procedure; he passed away in 2012. See <https://www.law.columbia.edu/news/archive/hans-smit-58-towering-figure-international-arbitration-dies-84> for more.

⁸ RESTATEMENT OF THE US LAW OF INT'L COMMERCIAL AND INVESTOR-STATE ARB (AM. L. INST. 2019), <https://www.thealiadviser.org/international-commercial-arbitration/>.

⁹ Carolyn Lamm is a Partner at White & Case (Washington, D.C.) and a renowned leader in the field of international arbitration. See <https://www.whitecase.com/people/carolyn-lamm> for more.

¹⁰ See George A. Bermann et al., *Restating the U.S. Law of International Commercial Arbitration*, 113 PENN. STATE L. REV. 1333 (2009) (reflecting on the process of producing and presenting the Preliminary Draft of a chapter addressing Recognition and Enforcement of Arbitral Awards).



States Supreme Court ruling in *ZF Automotive US, Inc. v. Luxshare, Ltd.*, 142 S. Ct. 2078 (2022),¹¹ brought the project back to the drawing board as the Court took the opposite view on the applicability of 28 U.S.C. § 1782 in international arbitration as the Restatement authors.¹² Luckily, the Restatement collects both view points on the issue, so it was mainly a matter of redrafting the black letter law and comments, and reversing the reporter's notes to support the Court's opinion.

On the open question of whether ICSID arbitration will be considered differently than commercial arbitration under § 1782, Prof. Bermann opined that functionally speaking, while ICSID tribunals pass judgment on government actions, they will likely not be considered to be exercising governmental authority.

V. REFLECTIONS

After guiding Prof. Bermann through the various twists and turns of his career, Prof. Bjorklund changed gears, asking Prof. Bermann to reflect on his career: "Which arbitral award, that a tribunal on which you were sitting, has had the broadest influence?" Prof. Bermann turned to *P.L. Holdings v. Poland*,¹³ in which the Tribunal, of which he was President, denied Poland's intra-EU objection to jurisdiction. On appeal, the *Svea* Court of Appeals again denied the intra-EU objection, finding that unlike in *Achmea v. Slovakia* (I) – which was pending before the European Court of Justice at the time – Poland did not raise an intra-EU objection, which the lower Swedish court deemed waived.¹⁴ The case was referred to the European Court of Justice, which, in Prof. Bermann's view, essentially extended the *Achmea* holding to commercial arbitration.¹⁵

¹¹ George A. Bermann, *ZF Automotive: Predictable Outcome, Lackluster Reasoning*, TRANSNAT'L LIT. BLOG (June 14, 2022), <https://tlblog.org/zf-automotive-predictable-outcome-lackluster-reasoning/> (discussing and criticizing the Supreme Court's analysis and outcome in *ZF Automotive*).

¹² Brief Amici Curiae of George A. Bermann et al., *ZF Auto. US, Inc. v. Luxshare, Ltd.*, 142 S. Ct. 2078 (2022), <https://www.scotusblog.com/case-files/cases/zf-automotive-us-inc-v-luxshare-ltd/>.

¹³ *PL Holdings S.à.r.l. v. Republic of Poland*, SCC Case No. V 2014/163, Partial Award, ¶ 316 (June 28, 2017).

¹⁴ *PL Holdings S.à.r.l. v. Republic of Poland*, SCC Case No. V 2014/163, Judgment of Svea Court of Appeal on Set-aside Application (English), pg. 34-35, 38-42 (Feb. 22, 2019).

¹⁵ *PL Holdings S.à.r.l. v. Poland*, SCC Case No. V 2014/163, Judgment of the Grand Chamber of the European Court of Justice, ¶¶ 47-56 (Oct. 26, 2021).



When asked to reflect on the changes in the field since he began his career, Prof. Bermann mentioned demographics and technology, but alighted on a particular change in advocacy, related to the political polarization seen across the globe: demonization of the other. His solution to this negative advocacy was to emphasize that it doesn't work. "Lawyers are pragmatic," he mused, "if you tell them, 'you have an interest in doing things differently,' there might be a response."

In closing, Prof. Bermann advised new practitioners to attempt to make it seem like they sincerely believe the position of their client, to concede ground, when possible, in order to garner credibility, and to overall demonstrate good judgment and reasonableness.

VI. CONCLUSION

Prof. Bermann is undoubtedly one of the most influential practitioners in the field of international arbitration. His career boasts a star-studded cast of similarly impressive colleagues and a commitment to crafting the next generation of giants. One can only hope that he continues to chair tribunals and classroom podia alike.



ANNA ISERNIA DAHLGREN, ESQ. is an appellate law clerk at the Colorado Court of Appeals and a recent graduate from American University Washington College of Law ("AUWCL"), where she graduated cum laude, was selected to be a Special Legal Assistant to the United Nations International Law Commission's Draft Commissioner in 2019 and served as captain of AUWCL's 2021 Frankfurt Investment Moot Court Competition Team. She led her team to the Advanced Round of 16 and now coaches the AUWCL team, which won the Moscow Pre-Moot in 2022. She is passionate for all methods of dispute resolution and is particularly interested in the intersection of the global energy transition and international arbitration. She also holds a B.A. in International Relations (2015), speaks German and Italian, and studied Mandarin at East China Normal University in Shanghai.

**INSTITUTE FOR TRANSNATIONAL ARBITRATION
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THE CENTER FOR AMERICAN AND INTERNATIONAL LAW**

The Institute for Transnational Arbitration (ITA) provides advanced, continuing education for lawyers, judges and other professionals concerned with transnational arbitration of commercial and investment disputes. Through its programs, scholarly publications and membership activities, ITA has become an important global forum on contemporary issues in the field of transnational arbitration. The Institute's record of educational achievements has been aided by the support of many of the world's leading companies, lawyers and arbitration professionals. Membership in the Institute for Transnational Arbitration is available to corporations, law firms, professional and educational organizations, government agencies and individuals.

A. MISSION

Founded in 1986 as a division of The Center for American and International Law, the Institute was created to promote global adherence to the world's principal arbitration treaties and to educate business executives, government officials and lawyers about arbitration as a means of resolving transnational business disputes.

B. WHY BECOME A MEMBER?

Membership dues are more than compensated both financially and professionally by the benefits of membership. Depending on the level of membership, ITA members may designate multiple representatives on the Institute's Advisory Board, each of whom is invited to attend, without charge, either the annual ITA Workshop in Dallas or the annual Americas Workshop held in a different Latin American city each year. Both events begin with the Workshop and are followed by a Dinner Meeting later that evening and the ITA Forum the following morning - an informal, invitation-only roundtable discussion on current issues in the field. Advisory Board Members also receive a substantial tuition discount at all other ITA programs.

Advisory Board members also have the opportunity to participate in the work of the Institute's practice committees and a variety of other free professional and social membership activities throughout the year. Advisory Board Members also receive a



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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.

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