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A NOTE FROM THE EDITORS-IN-CHIEF: WELCOME TO *ITA IN REVIEW*!

by Rafael T. Boza & Charles (Chip) B. Rosenberg

We are delighted to announce the official launch of *ITA in Review*, the new and dynamic on-line law journal of the Institute for Transnational Arbitration (ITA).

ITA in Review is a cutting-edge publication that addresses key developments in the field of international and domestic dispute resolution, including arbitration, conciliation, litigation, and mediation, through diverse content, such as scholarly and practical articles, transcripts of ITA's programs, book reviews, short comments, video interviews, and multimedia presentations. *ITA in Review* strives to provide a voice and platform for diverse contributors, including Young ITA members.

The genesis of *ITA in Review* can be traced back a decade to the *World Arbitration and Mediation Review* (WAMR), a law journal which quickly became the ITA's premiere legal publication. Unfortunately, about two years ago, the ITA and WAMR parted ways, leaving a void in the ITA. However, the ITA leadership refused to accept the loss of such a valuable resource and in 2017 formed a task force to address this void. After several attempts and many iterations of names, usability, reach, and design, *ITA in Review* was born.

It is only fitting that *ITA in Review* would be born 10 years after the ITA first began its publishing efforts. In numerology, the number 10 represents crystallization, the idea of patience, and nascent birth. *ITA in Review* enshrines these concepts. *ITA in Review* is the rebirth of ITA's publishing efforts and the crystallization of the many ideas that the ITA has been patiently waiting for the opportunity to materialize.

Many ITA members, some of whom already have left us, devoted much to make ITA's historical publication efforts a success. The significant contributions of Judge Charles N. Brower, James Castello, Prof. David Caron (†), Donald Donovan, R. Doak Bishop, Prof. Lucy Reed, Prof. Charles (Chip) Brower, Prof. Andrea Bjorklund, Dietmar Prager, David Winn, Leah Harhay (†), and many others infuse and inspire *ITA in Review*.

On behalf of the *ITA in Review* Editorial Board, we are excited to launch *ITA in Review* and trust that our readership will find its instructive, interesting, and cutting-edge content to be of great value.

Sincerely,

RAFAEL T. BOZA is an international attorney with almost 20 years of experience. He has successfully handled complex litigation, arbitration, and transactional matters both in the US and abroad.
Rafael received his legal education in Peru, Belgium and the U.S. Since the beginning of his career, Rafael has been involved in the arbitration field as arbitrator, counsel, and publisher. Rafael has worked in Peru, Chile, and the US as counsel for banks, governmental entities, and large corporations and has extensive experience in Latin America, including in Mexico, Colombia, Ecuador, Brazil, Peru, Argentina, and Venezuela. Rafael now works for Sarens USA, Inc., a subsidiary of the Sarens Group, a Belgian group expert in heavy lift and engineered transport with operations all over the world.

CHARLES (CHIP) B. ROSENBERG is Counsel in King & Spalding's International Arbitration practice. He is a specialist in public international law and international arbitration, focusing on both investment treaty arbitration and international commercial arbitration.
Chip repeatedly has been recognized as a "Future Leader" by Who's Who Legal: Arbitration (2017-2019), which focuses on selecting outstanding attorneys aged 45 or under. Who's Who Legal wrote in its most recent edition (2019) that Chip is "'a brilliant writer and tactician' who peers note 'really gets it' when it comes to complex arbitration proceedings and is 'one to watch,'" and described him in its inaugural edition (2017) as "hardworking and approachable." He also repeatedly has been recognized as a "Rising Star" by DC Super Lawyers (2016-2018).
Prior to joining King & Spalding, Chip spent two years clerking for The Honorable Charles N. Brower, who was ranked the "world's busiest arbitrator" by The American Lawyer in terms of large investment treaty and international commercial arbitrations, in London, England and at the Iran-United States Claims Tribunal in The Hague, The Netherlands.
Chip graduated first in his class, summa cum laude, and Order of the Coif from the American University Washington College of Law.

THE ENFORCEMENT OF CANNABIS-RELATED CONTRACTS & ARBITRATION AWARDS

by Todd A. Wells, Michael Reilly & Taylor Minshall

I. INTRODUCTION

Contracts and legal instruments of all types in cannabis-related[1] transactions are being signed across the United States (U.S.). The validity and enforceability of these contracts is an open question. Traditionally, contract law has provided for the defense of public policy or illegality – an illegal contract is not enforceable. A contract that cannot be enforced is not a contract at all. Are these cannabis-related contracts worth the paper they are written on?

Although a handful of Colorado state trial courts and courts in California, Arizona, and Texas have recently enforced cannabis-related contracts in the face of illegality arguments, other courts have not.[2] In this context, U.S. and Colorado arbitration law provide a unique forum for the enforcement of cannabis-related contracts.

The topic becomes even more important now as several additional states, including Arkansas, California, Florida, Maine, Massachusetts, and Nevada, among others, have also recently legalized cannabis for medical and/or recreational use. The cannabis market is developing, and the legal framework has not yet adapted to the new reality.

Cannabis-related contracts, which may be considered "illegal" due to federal law, *may* be enforced nationwide in the U.S. with the use of Colorado law, the Colorado arbitration forum, and the Full Faith and Credit Clause of the U.S. Constitution.[3]

The enforcement of these contracts is not an abstract problem. Notwithstanding U.S. federal drug laws, and recognizing the harsh reality they impose, the Denver District Court has stated that enforceability is paramount to the operation of cannabis-related business. The court stated:

> With the privileges afforded the marijuana industry by the voters [of Colorado] come obligations, including all obligations

[1] This article uses the scientific name "cannabis" to refer to the American slang term "marijuana."
[2] *See infra* § II.
[3] U.S. CONST. art. IV, § 1.

> inherent in operating in the legitimate commercial world. This includes business relationships and obligations such as contracts, operating agreements and corporate articles and bylaws, among many other things. These relationships must be enforceable so that this newly legitimate industry does not devolve into commercial anarchy.[4]

This Article examines the enforcement of contracts in this partially legalized industry from the perspective of Colorado and U.S. law in six parts. First, we will examine the court-based enforcement of cannabis-related contracts in the U.S.. Next, we will analyze the likelihood of enforcement of arbitration agreements in cannabis-related contracts. Following this, we will examine the role of the administering arbitral institutions, the arbitrators, and legal counsel, addressing the difficulties faced by these stakeholders when working with cannabis-related disputes. We will then explore the difficulties that may arise during the confirmation of the arbitration award, and especially during the confirmation of arbitration awards granting equitable relief to the prevailing party. Finally, we will inquire as to the availability of interstate enforcement for the confirmed arbitration award.

When reading this Article the reader must consider that the development of the law in this area is fast moving and any new actions or policy changes made by the U.S. federal government to enforce federal drug laws related to cannabis could shut down this entire industry at any moment. However, we believe this to be unlikely given the current trend, with many more states poised to legalize cannabis use.

II. COURT-BASED ENFORCEMENT OF CANNABIS-RELATED CONTRACTS IN THE UNITED STATES

The cannabis industry is booming in Colorado. How is this possible when cannabis remains a regulated substance under the U.S. Controlled Substances Act (the "CSA")[5] with no permitted uses under federal law?[6] Colorado is now well-known internationally for a citizen referendum passed in November 2012, Amendment 64, which made limited home-growing, possession, consumption, and commercial sale of cannabis legal for those over 21 years old, including for recreational purposes,

[4] North v. Wemhoff, No. 12CV3005, 2013 WL 8604042 (Colo. Dist. Ct. June 21, 2013) (Elliff, J.).
[5] Controlled Substances Act, 21 U.S.C. § 801 et seq.
[6] 21 U.S.C. § 841(a).

under the Colorado Constitution.[7] Long before this, in November 2000, the citizens of Colorado approved Amendment 20 to the Colorado Constitution which legalized the use, possession, and sale of cannabis for medical purposes.[8] Pursuant to Amendment 64, the first commercial sale of cannabis occurred in Colorado on the morning of January 1, 2014. The rest is history.

How can an industry flourish when the web of contracts supporting the industry are seemingly built upon questionable legal grounds? In the U.S., this unique dilemma is caused by the relationship between two sovereigns: the individual U.S. states and the U.S. federal government. A majority of U.S. states have now legalized and/or decriminalized and regulated the use and possession of cannabis for medical purposes, and many others have now done the same in regards to the use and possession of cannabis for non-medical (recreational) purposes. In response to this growing trend across the nation, the federal government has made the conscious decision to relax enforcement of federal drug laws related to cannabis.[9] Although there has been increased uncertainty regarding federal policy under the Trump Administration, Congress reiterated its view on medical cannabis policy in March 2018 by renewing its ongoing ban, under the "Rohrabacher-Farr Amendment," that prohibits the U.S. Department of Justice from using any funds to prevent the implementation of state medical cannabis laws.[10] Since the legalization and regulation of medical and recreational cannabis in Colorado, a number of cases have come before Colorado state courts seeking the enforcement of cannabis-related

[7] Amend. 64, incorp. as Colo. Const., Art. XVIII, § 16 ("Personal Use and Regulation of Marijuana").
[8] Amend. 20, incorp. as Colo. Const., Art. XVIII, § 14 ("Medical use of marijuana for persons suffering from debilitating medical conditions").
[9] James M. Cole, Guidance Regarding Marijuana Enforcement, U.S. Dep't of Justice, Office of the Deputy Attorney General (Aug. 29, 2013) (The "Cole Memo" was rescinded by the U.S. Dep't of Justice in a Memorandum dated Jan. 4, 2018 by U.S. Attorney General Jeff Sessions, *available at* https://www.justice.gov/opa/pr/justice-department-issues-memo-marijuana-enforcement. In response to this rescission, the U.S. Attorney for Colorado, Bob Troyer, issued a statement on the same day stating that there would be no different approach to prosecutions related to marijuana due to the rescission, https://www.justice.gov/usao-co/pr/us-attorney-bob-troyer-issues-statement-regarding-marijuana-prosecutions-colorado. Colorado Attorney General, Cynthia Coffman, issued a similar statement on Jan. 4, 2018, *available at* https://coag.gov/sites/default/files/contentuploads/ago/press-releases/2018/01/01-04-18/1-04-2018-statementagcoffmanonfederalchangestomarijuanapolicies.pdf).
[10] Pub. L. No. 113-235, § 538, 128 Stat. 2130, 2217 (2014) (Section 538 of the Consolidated and Further Continuing Appropriations Act, 2015, a federal appropriations bill signed into law in December 2014).

contracts.[11] Colorado state court judges have not agreed on the extent to which these contracts are enforceable because of the continuing regulation of cannabis under the federal Controlled Substances Act.

The CSA states that it is illegal for anyone to knowingly or intentionally manufacture, distribute, dispense, or possess with intent to manufacture, distribute, or dispense a controlled substance. Cannabis is listed in Schedule I of the CSA, a category reserved for "hallucinogenic substances."[12] According to Schedule I, a substance is one that (1) has a high potential for abuse; (2) has no currently accepted medical use in treatment in the U.S.; and (3) lacks accepted safety for use of the drug under medical supervision.[13]

Despite the near total prohibition of cannabis under the CSA, the federal government has permitted U.S. states to experiment with different types of regulation, including state law systems that permit the use, possession, and sale of cannabis. The Colorado Federal District Court has noted that "[t]he Department of Justice has made a conscious, reasoned decision to allow the states which have enacted laws permitting the cultivation and sale of medical and recreational marijuana to develop strong and effective regulatory and enforcement schemes."[14]

This relaxation of CSA enforcement by the federal government has left cannabis-related contracts in a twilight world of legality and enforceability. Even as the sun rises with the reformation of U.S. federal drug policy, large patches of legal darkness will likely remain in the distant future among individual U.S. states and in other countries. Issues of legality and enforceability will continue.

Long ago, the U.S. Supreme Court summarized the position of U.S. law on the enforceability of "illegal" contracts:

> The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract. In

[11] *See infra* § II.
[12] CSA, *supra* note 5, at § 812(c), Sch. I(c)(10) (Cannabis is listed in (c)10 as "marijuana" and through its chemical element in (c)17, Tetrahydrocannabinols).
[13] *Id.*
[14] Safe Streets Alliance v. Alternative Holistic Healing, LLC, No. CV 15-00349-REB-CBS, at *11, 2016 WL 223815, at *5 (D. Colo. Jan. 19, 2016) (referring to COLE, *supra* note 9) aff'd sub nom. Safe Streets All. v. Hickenlooper, 859 F.3d 865 (10th Cir. 2017).

> case any action is brought in which it is necessary to prove the illegal contract in order to maintain the action, courts will not enforce it, nor will they enforce any alleged rights directly springing from such contract. In cases of this kind the maxim is, "Potior est conditio defendentis."[15]

Loosely translated, the maxim *Potior est conditio defendentis* means: better is the condition of the defendant, than that of the plaintiff. However, simply declaring that a contract is "illegal" is not enough. The real analysis turns to public policy, not blanket assertions of illegality. The Colorado Federal District Court has stated that "[e]arly in this century [20th], the Colorado Supreme Court declared that 'before . . . a contract can be declared illegal upon the ground that it is against public policy, it must clearly appear that it is obnoxious to the pure administration of justice, or manifestly injurious to the interests of the public.'"[16] This hurdle comes with at least one express carve out: "[p]arties cannot by private contract abrogate statutory requirements or conditions affecting the public policy of the state."[17]

The Colorado Supreme Court has warned against finding merely theoretical or "problematic" issues when considering public policy:

> Before a court should determine a contract which has been made in good faith stipulating for nothing that is *malum in se*, nothing that is made *malum prohibitum*, to be void as contravening the policy of the state, it should be satisfied that the advantage to accrue to the public for so holding is certain and substantial, not theoretical or problematic.[18]

The policy of respecting and enforcing the freedom to contract is also relevant to the analysis of public policy and contract enforceability:

> Basic to our decision on the validity of the questioned clause is the proposition that one of the essential freedoms of citizenry is the right to bargain and contract. Our commercial society requires that each party be permitted to bargain in its own interest and that such bargains will be upheld by courts of law so long as they are founded upon relatively equal bargaining positions and are not manifestly unjust or injurious to the general welfare of the populace as a whole. Until fully and solemnly convinced that an existent public policy is clearly

[15] McMullen v. Hoffman, 174 U.S. 639, 654 (1899).
[16] Superior Oil Co. v. Western Slope Gas Co., 549 F. Supp. 463, 468 (D. Colo. 1982) (quoting Wood v. Casserleigh, 71 Pac. 360, 361 (Colo. 1902)).
[17] University of Denver v. Industrial Com'n of Colo., 335 P.2d 292, 294 (Colo. 1959).
[18] Mitchell v. Jones, 88 P.2d 557, 560 (Colo. 1939).

> revealed, a court is not warranted in applying that principle of public policy to void a contract.[19]

In this public policy context, recent state and federal court cases in Arizona, California, Colorado, and Hawaii have tested the limits of enforceability, specifically, under the CSA:

1. In March 2012, in *Tracy v. USAA Casualty Ins. Co.*, the Federal District Court of Hawaii held that an insurance policy that purportedly covered the loss of cannabis plants was unenforceable under the CSA.[20]
2. In April 2012, in *Hammer v. Today's Health Care II*, the Arizona Superior Court in Maricopa County held that loan documents related to a medical cannabis growing facility were unenforceable for illegality under federal law.[21]
3. In August 2012, in *Haeberle v. Lowden*, the Colorado District Court of Arapahoe County refused to enforce a contract for the sale of medical cannabis due to federal law and "preemption."[22]
4. In September 2013, in *Garcia v. Thomas*, the California Superior Court of Sacramento County refused to enforce a contract involving an investment in a medical cannabis business for illegality under federal law.[23]
5. In two cases in the Colorado District Court of Denver County, one in June and one in December 2013, Judges Herbert L. Stern, III and J. Eric Elliff, in the cases of *West v. Green Cross* and *North v. Herbal Remedies*, respectively, relied on Colorado public policy to refuse to invalidate cannabis-related contracts despite the CSA.[24]
6. In December 2013, in *Equity Trust v. Jones*, Judge David L. Shakes of the Colorado District Court of El Paso County analyzed the public policy defense

[19] *Superior Oil*, 549 F. Supp. at 468 (referring to Percy H. Winfield, *Public Policy in the English Common Law*, 42 HARV. L. REV. 76 (1928)).
[20] Tracy v. USAA Casualty Ins. Co., No. 1:11-cv-00487, 2012 WL 928186, at **11-13 (D. Hi. Mar. 16, 2012).
[21] Hammer v. Today's Health Care II, No. CV2011–051310, 2012 WL 12874349 (Ariz. Super. Ct. Maricopa Cnty. Apr. 17, 2012) (McVey, J.).
[22] Haeberle v. Lowden, No. 2011CV709, 2012 WL 7149098, at *1 (Colo. Dist. Ct. Arapahoe Cnty Aug. 8, 2012) (Pratt, J.).
[23] Garcia v. Thomas, 34-2013-00138040-CU-BC-GDS (Cal. Super. Ct. Sacramento Cnty. Sept. 6, 2013).
[24] West v. Portnoy, No. 12CV5636, 2013 WL 7202143 (Colo. Dist. Ct. Denv. Cnty. Dec. 27, 2013) (Stern, J.); North v. Wemhoff, No. 12CV3005, 2013 WL 8604042 (Colo. Dist. Ct. Denv. Cnty. June 21, 2013) (Elliff, J.).

under federal and Colorado state law in the most detailed opinion on the issue to-date and refused to invalidate contracts related to cannabis.[25]

7. In February 2016, Chief Judge Marcia Krieger of the Federal District Court of Colorado enforced a cannabis-related insurance policy notwithstanding the insurance company's argument that coverage should be denied based on public policy even if the insurance policy would otherwise cover the insured's losses.[26]
8. In November 2016, the Federal District Court for the Northern District of California concluded that where a defendant failed to make payments under a contract for the sale of a consulting business related to the cannabis industry, the court "could grant relief in this case that does not require [defendant] to violate the CSA."[27]
9. In April 2017, the Court of Appeals of Arizona adopted the reasoning from *Mann* and *Green Earth Wellness*, and after applying the factors from the Restatement (Second) of Contracts § 178, held that a lease contract related to a cannabis business was enforceable notwithstanding federal law under the CSA.[28]
10. In November 2017, the Federal District Court for the Northern District of Texas concluded that a "black-and-white" allegation that a contract was illegal under the CSA was insufficient for purposes of a Fed. R. Civ. P. 12(b)(6) motion to dismiss, and that the court could enforce the agreement between the parties

[25] Equity Trust v. Jones, No. 13CV1545 (Colo. Dist. Ct., El Paso Cnty Dec. 9, 2013) (Shakes, J.).
[26] The Green Earth Wellness Center, LLC v. Atain Specialty Ins. Co., 163 F. Supp. 3d 821, 832-35 (D. Colo. 2016).
[27] Mann v. Gullickson, No. 3:15-cv-03630, 2016 WL 6473215, at *7 (N.D. Cal. Nov. 2, 2016).
[28] Green Cross Medical, Inc. v. Gally, 395 P.3d 302, 309-310 (Ariz. App. 2017) ("In applying these factors, we recognize there is a tension between the CSA and the AMMA [Arizona Medical Marijuana Act] because the CSA still criminalizes the sale, use, or possession of medical marijuana whereas the AMMA offers immunity and protections for those persons operating in compliance with the AMMA. Nevertheless, refusing to enforce such contracts would undermine the medical marijuana program the voters approved. Enforcing such contracts leaves the federal government in the same position it has chosen with respect to medical marijuana in Arizona. If the federal government wishes to end such programs by enforcing the CSA, it has the power to do so provided Congress permits use of federal funds to conduct such prosecutions and the Department of Justice desires to bring such actions. We conclude the lease was enforceable at least for purposes of a damages action for its breach.").

without violating federal law.[29]

Judge Shakes' opinion in *Equity Trust* is noteworthy among the early cases on the enforceability of cannabis-related contracts because of the depth of the public policy analysis and the application of both Colorado state law and federal law under a balancing test.[30] After analyzing the enforceability of the contract under the Restatement (Second) of Contracts § 178, the court concluded:

> The argument that the public policy of Colorado must yield to the higher federal public policy as expressed in the [CSA] is not persuasive. [T]he pronouncements and actions of the federal government in this area indicate that there is no strong federal public policy to override Colorado's public policy in this area. Therefore, this court is not "fully and solemnly convinced" that an existing public policy is clearly revealed that directs that the contracts at issue be voided.[31]

Part of Judge Shakes' analysis includes a reference to an express public policy pronouncement by the Colorado legislature: "It is the public policy of the state of Colorado that a contract is not void or voidable as against public policy if it pertains to lawful activities authorized by section 16 of article XVIII of the state constitution and article 43.4 of title 12, C.R.S."[32]

Judge Shakes' opinion makes it clear that simply asserting the illegality of a contract under the CSA alone is not a sufficient reason to render the contract unenforceable.[33] The court must engage in a public policy analysis of the type envisioned in the Restatement (Second) of Contracts § 178.[34]

Section 178 of the Restatement identifies a number of relevant factors:

> (2) In weighing the interest in the enforcement of a term, account is taken of
> (a) the parties' justified expectations,
> (b) any forfeiture that would result if enforcement were denied, and
> (c) any special public interest in the enforcement of the particular term.

[29] Ginsburg v. ICC Holdings, LLC, 3:16-cv-02311, 2017 WL 5467688, at *9 (N.D. Texas, Dallas Division, Nov. 13, 2017).
[30] *Equity Trust*, at 4.
[31] *Id.* at 11.
[32] C.R.S. § 13-22-601.
[33] *Equity Trust*, at 11.
[34] RESTATEMENT (SECOND) OF CONTRACTS § 178 (1981).

> (3) In weighing a public policy against enforcement of a term, account is taken of
> (a) the strength of that policy as manifested by legislation or judicial decisions,
> (b) the likelihood that a refusal to enforce the term will further that policy,
> (c) the seriousness of any misconduct involved and the extent to which it was deliberate, and
> (d) the directness of the connection between that misconduct and the term.[35]

Notwithstanding the Restatement (Second) of Contracts § 178, the cases listed above, with the exception of *Equity Trust*, demonstrate a trend that courts may not be willing to engage in a full public policy analysis of the kind envisioned in § 178. However, under existing Colorado common law, the countervailing public policy of enforcing contracts outweighs any interest in refusing to enforce the contract unless and until a party can fully convince the court that the contract should not be enforced as a matter of public policy.[36] Moreover, now that the Colorado Federal District Court has weighed in on the issue in favor of enforcement, public policy arguments against the enforcement of cannabis-related contracts *subject to Colorado law* are unlikely to be successful barring a change in current federal drug policy.

III. THE ENFORCEMENT OF ARBITRATION AGREEMENTS IN CANNABIS-RELATED CONTRACTS

The addition of an arbitration clause to a cannabis-related contract would not, at first glance, seem to make much of a difference. An illegal contract is an illegal contract, right? What happens, however, when a court is asked to refuse enforcement of a cannabis-related contract containing an arbitration clause? In *Party Yards v. Templeton*, the Florida Court of Appeals described this dilemma in the context of a usury contract. The court stated:

> A court's failure to first determine whether the contract violates Florida's usury laws could breathe life into a contract that not only violates state law, but also is criminal in nature, by use of an arbitration provision. This would lead to an absurd result. Legal authorities from the earliest time have unanimously held that no court will lend its assistance in any

[35] *Id.*
[36] *Equity Trust*, at 11.

way towards carrying out the terms of an illegal contract.[37]

Legal authorities from the earliest time did not operate within the black hole gravity of the U.S. (Federal) Arbitration Act.[38] Six years after *Party Yards*, the U.S. Supreme Court ended any debate on the enforceability of arbitration clauses in allegedly illegal contracts in *Buckeye Check Cashing v. Cardegna.*[39] In an opinion authored by Justice Antonin Scalia, the Court held that where parties have agreed to arbitrate disputes in a contract it is the arbitrator and not a judge who determines the validity of the contract. The court stated: "[w]e reaffirm today that, regardless of whether the challenge is brought in federal or state court, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator."[40]

Justice Scalia's analysis applies the well-established doctrine of severability, sometimes also referred to as separability.[41] Under this doctrine, state and federal courts should only look at the arbitration clause itself when considering whether to compel parties to arbitrate disputes falling within the scope of the arbitration clause. The arbitration clause is "separable" from the main contract.[42] Essentially, the courts will not entertain allegations that the main contract was induced by fraud or that it is void for reasons of public policy.[43] This holding has fully preemptive effect at the state court level. [44]

Almost all U.S. states have adopted some version of the Uniform Arbitration Act (UAA) into state law. Colorado adopted the Revised Uniform Arbitration Act (RUAA) in 2004.[45] Prior to 2004, the UAA was in effect.[46] A unique feature of Colorado law is that arbitration was enshrined in the Colorado Constitution from the date of its founding as a U.S. state in 1876. The Colorado Constitution states:

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[37] Party Yards, Inc. v. Templeton, 751 So.2d 121, 123 (Fla. Ct. App. 2000) (citing *McMullen*, 174 U.S. at 654).
[38] Federal Arbitration Act, 9 U.S.C. §§ 1-16 [hereinafter "FAA"].
[39] Buckeye Check Cashing v. Cardegna, 546 U.S. 440 (2006).
[40] *Id.* at 449.
[41] *Id.* at 446; Prima Paint v. Conklin, 388 U.S. 395, 402 (1967).
[42] *Buckeye*, 546 U.S. at 446.
[43] *Id.*
[44] *Id.*
[45] Colorado Revised Uniform Arbitration Act, C.R.S. § 13-22-201, *et. seq.* (2004) [hereinafter "Colo. RUAA"].
[46] Colorado Uniform Arbitration Act, C.R.S. § 13-22-201, *et seq.* (1956).

> It shall be the duty of the general assembly to pass such laws as may be necessary and proper to decide differences by arbitrators, to be appointed by mutual agreement of the parties to any controversy who may choose that mode of adjustment. The powers and duties of such arbitrators shall be as prescribed by law.[47]

U.S. state arbitration acts, particularly the RUAA, are generally intended to work alongside the FAA.[48] In other words, there is no particular reason to believe that the current RUAA itself conflicts with the FAA or would be rendered preempted in some way. The key holding in *Buckeye Check Cashing* is already codified in C.R.S. § 13-22-206(3): "An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable."[49] Due to the preemptive and precedential power of *Buckeye* under 9 U.S.C. § 2, C.R.S. § 13-22-206(3) should be interpreted to give arbitrators the exclusive power to determine challenges based on the alleged illegality of a contract.

In the event that a federal or state court is asked to void or otherwise render unenforceable an allegedly "illegal" contract containing an arbitration clause, the court is not in a position to make such a determination regardless of the court's views on public policy or the legality of the contract. A main contract that contains allegedly "illegal" subject matter, and an arbitration clause, cannot be refused enforcement by a court at the arbitration agreement enforcement stage.

To make it clear that the parties want an arbitrator to apply Colorado state public policy to the main contract, consider adding language to that effect in the arbitration clause, for example:

> Any dispute, claim or controversy arising out of or relating to this agreement or the breach, termination, enforcement, interpretation, *legality*, *issues of public policy or validity thereof*, including the determination of the scope or applicability of this agreement to arbitrate, shall be determined exclusively by arbitration in Denver, Colorado, USA and shall be governed

[47] Colo. Const. Art. XVIII, § 3; *see also* Byerly v. Kirkpatrick Pettis Smith Polan, 996 P.2d 771, 773 (Colo. App. 2000) ("Colorado public policy strongly favors the resolution of disputes through arbitration."); Camelot Investments, LLC v. LANDesign, LLC, 973 P.2d 1279 (Colo. App. 1999).
[48] See *Prefatory Note*, [Revised] Uniform Arbitration Act (2000), National Conference of Commissioners on Uniform State Laws.
[49] Colo. RUAA, *supra* note 45, at § 13-22-206(3).

> exclusively by the Colorado Revised Uniform Arbitration Act, Colorado Revised Statutes Section 13-22-201, et seq.
> The laws of the state of Colorado, including the Colorado Revised Uniform Arbitration Act, shall apply *exclusively* as the laws governing this arbitration agreement without reference to any conflict of laws rules.

The decision whether to enforce a contract, based on the underlying subject matter of the contract, must be made by an arbitrator when the parties have agreed to arbitrate disputes. U.S. arbitration law may remove illegality arguments from the purview of a court. However, other issues, such as the willingness of administering arbitral institutes to administer the case, the willingness of an arbitrator to enforce the contract, and even the availability of legal counsel, may arise related to the enforcement of an arbitration agreement in a cannabis-related contract.

IV. ADMINISTRATORS, ARBITRATORS, & LEGAL COUNSEL

Once a dispute that is subject to resolution by arbitration has moved beyond any initial court challenges, several crucial issues exist within the arbitration process itself related to enforcement of the contract. First, if the parties have chosen "administered" arbitration, it is possible that the administrator could refuse administration of the case based on the alleged illegality of the contract. Second, the arbitrator is given the power to decide whether the contract is against public policy. Therefore, issues relating to the alleged illegality of the contract do not simply disappear because the court is not permitted to rule on the issue. Lastly, even if an administering arbitration organization is willing to administer a case and the arbitrator does not view the contract as against public policy, parties may still have difficulty finding legal counsel willing and able to litigate cannabis-related disputes even in the context of arbitration.

A. *Administrators*

Parties may or may not select the use of a specific arbitration organization for the administration of the arbitration. These administering organizations maintain their own arbitration rules and partially serve the same function as a court clerk by administering the case. These organizations include, among many others, long-standing organizations such as the American Arbitration Association and JAMS. The

opposite of administered arbitration is *ad hoc* arbitration where the arbitrator(s), or their assistants, essentially serve the administration function. Arbitration institutions are generally under no obligation to administer a case despite any agreement by the parties to use the administering organization.[50] For example, arbitration organizations are not regulated in the U.S. and, like arbitrators, generally receive the same kind of immunity from civil liability as state court judges.[51]

Administering arbitration organizations based in states where cannabis remains fully or partially illegal under state law may have particular concerns about administering cannabis-related cases. In particular, issues may arise related to quality disputes where samples may be handled during the arbitration. In other situations, an arbitrator may be requested to award specific performance relief involving a sale of cannabis. Such issues cause concerns as to whether an arbitration organization will be willing and able to administer a case where sensitive cannabis possession and testing issues arise. For arbitration organizations based in the states where cannabis remains fully illegal, or where prosecutions continue in full swing, the dangers of involvement in cannabis-related arbitration are very real. Moreover, for arbitration organizations acting as non-profit organizations under federal law, a common form of legal entity among arbitration service providers, additional concerns, such as the potential loss of non-profit status, may cause the organization to deny the administration of cannabis-related disputes.

The enforceability of unclear or uncertain contract terms is an additional factor which weighs in the favor of caution when choosing a specific administering organization. If the parties agree, in an arbitration clause, for a specific arbitration

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[50] *See* AAA Commercial Arbitration Rules (2013), Rule 52(d):

> Parties to an arbitration under these rules shall be deemed to have consented that neither the AAA nor any arbitrator shall be liable to any party in any action for damages or injunctive relief for any act or omission in connection with any arbitration under these rules.

JAMS Comprehensive Arbitration Rules and Procedures (2014), Rule 30(c):

> The Parties agree that neither the Arbitrator, nor the Case Manager, nor JAMS is a necessary Party in any litigation or other proceeding relating to the Arbitration or the subject matter of the Arbitration, and neither the Arbitrator, nor the Case Manager, nor JAMS, including its employees or agents, shall be liable to any Party for any act or omission in connection with any Arbitration conducted under these Rules, including, but not limited to, any disqualification of or recusal by the Arbitrator.

[51] Colo. RUAA, *supra* note 45, at § 13-22-214.

organization to administer the case, and that arbitration organization refuses to administer the case out of the illegality concerns, this may cause the arbitration clause to completely fail.

It has been frequently stated that arbitration is a creature of contract and generally applicable contract law applies to the formation, validity, and interpretation of arbitration agreements. In *United Steelworkers*, the U.S. Supreme Court stated that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit."[52] Courts "apply ordinary state-law principles that govern the formation of contracts to determine whether a party has agreed to arbitrate a dispute."[53] The Colorado Supreme Court has also stated that "[a] fundamental contractual requirement is that of certainty;"[54] and that "[t]he court can supply some elements in a contract, but they cannot make one; and when the language in a contract is too uncertain to gather from it what the parties intended, the courts cannot enforce it."[55] Therefore, "[a] court will not undertake to enforce a contract, unless by some lawful means it can ascertain and know just what the contract bound each party to do."[56] In sum, the FAA's "primary purpose" is to assure that:

> [P]rivate agreements to arbitrate are enforced *according to their terms*. Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate . . . so too may they specify by contract the rules under which that arbitration will be conducted.[57]

Where an arbitration organization refuses administration of a dispute the parties will likely be left in a void as to the next steps for resolution of the dispute. At this point, the relevant arbitration law may serve as a backstop to save the arbitration

[52] U. Steelworkers Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960).
[53] Walker v. BuildDirect.com Techs., Inc., 733 F.3d 1001, 1004 (10th Cir. 2013) (quoting Hardin v. First Cash Fin. Servs., Inc., 465 F.3d 470, 475 (10th Cir. 2006) (internal quotation marks omitted)).
[54] Stice v. Peterson, 355 P.2d 948, 952 (Colo. 1960) (internal citations omitted).
[55] Newton Oil Co. v. Bockhold, 76 P.2d 904, 908 (Colo. 1947).
[56] *Id.*
[57] Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989) (emphasis added).

process, which will likely include the FAA or state arbitration law but many uncertainties will remain. Not only is this a situation where the parties' agreement may be insufficiently certain to enforce, but this may also be viewed as a situation where the performance of the parties' agreement has been rendered impractical or frustrated by a supervening event.[58]

In the situation where an arbitration organization refuses administration of a case, the parties may be left without an enforceable arbitration clause and may be required to resolve their dispute in court. To prevent the types of failures indicated above, consider adding savings clause language to the arbitration agreement. For example:

> If one or more provisions of this agreement is for any reason held to be unenforceable or invalid, then such provisions will be deemed severable from the remaining provisions of this agreement and will in no way affect the validity or enforceability of such other provisions or the rights of the parties hereunder.
> If any provision of this agreement (or portion thereof, including the arbitration agreement) is determined by a court to be unenforceable as drafted by virtue of the duration, scope, extent, character or legality of any obligation contained herein, the parties acknowledge that it is their intention that such provision (or portion thereof) shall be construed in a manner designed to effectuate the purposes of such provision to the maximum extent enforceable under applicable law.
> In the event the right to arbitrate any dispute, claim, or controversy arising out of or relating to this agreement is rendered invalid or unenforceable for any reason, the dispute, claim or controversy arising out of or relating to this agreement shall be subject to the exclusive jurisdiction of the state courts in the City and County of Denver, State of Colorado, USA.

Parties should carefully consider which arbitration organizations are most likely to accept administration of a cannabis-related dispute or carefully develop an *ad hoc* arbitration clause that removes administering organizations from the equation. Additionally, the parties should consider a savings clause in their arbitration agreement providing for either some type of fallback *ad hoc* arbitration or an alternative court-based forum where cannabis-related contracts have a higher

[58] RESTATEMENT, *supra* note 34, at §§ 261-72; *In re* Salomon Inc. S'holders' Derivative Litig., 68 F.3d 554, 559-61 (2nd Cir. 1995); Ranzy v. Tijerina, 393 Fed. Appx. 174, 176 (5th Cir. 2010).

probability of being enforced.

B. *Arbitrators*

Buckeye shifts any initial public policy determination related to the subject matter of the contract to the arbitrator.[59] To the extent that the parties have expressly chosen Colorado law as applicable to the contract, arbitrators should look to the recent Colorado state and Colorado Federal District Court public policy decisions related to cannabis.[60] These include the decisions addressed above enforcing cannabis-related contracts such as the Colorado Federal District Court's decision in *The Green Earth Wellness Center*.[61] Nonetheless, one of the great advantages of arbitration is the ability of parties to choose their own destiny – party autonomy.[62] When designing the arbitration clause, care should be taken to empower the arbitrators to enforce the contract as a matter of Colorado public policy, and, to the extent possible, attempt to limit the arbitrator's public policy viewpoint:

> Notwithstanding any agreement by the parties to apply a different law or rules to the main contract containing this arbitration agreement, any principles of public policy applied by the arbitrators shall consist exclusively of Colorado state public policy, including, specifically, Colorado Revised Statutes Section 13-22-601(2015).
> An arbitrator exceeds his or her powers by voiding or refusing to enforce any contracts or arbitration agreements between the parties based solely on the cannabis-related nature of the contract. An arbitrator does not exceed his or her powers by voiding or refusing to enforce any contracts or arbitration agreements between the parties based on violations of state and local laws regulating cannabis.

C. *Legal Counsel*

The ability of a party to use in-house or regular outside counsel may be a special concern for some parties involved in the cannabis industry. Many attorneys may be highly uncomfortable litigating a cannabis-related dispute in federal court or in any public court. Arbitration, with the lack of public filings and the ability to design strong

[59] *Buckeye*, 546 U.S. at 445-46.
[60] *See* Cindy G. Buys, *The Arbitrators Duty to Respect the Parties' Choice of Law in Commercial Arbitration*, 79 ST. JOHN'S L. REV. 59 (2012).
[61] *The Green Earth Wellness Center*, 163 F. Supp.3d at 832-35.
[62] BUYS, *supra* note 60.

confidentiality obligations, may alleviate some of these concerns.

Attorney ethics rules generally prohibit attorneys from helping their clients commit illegal acts. Model Rule of Professional Conduct 1.2(d) prohibits attorneys from knowingly facilitating criminal conduct:

> A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.[63]

In March 2014, the Colorado Supreme Court approved the following change to Comment 14 of the equivalent Rule 1.2 of the Colorado Rules of Professional Conduct permitting attorneys to provide regular legal services to cannabis businesses operating in compliance with Colorado state law:

> A lawyer may counsel a client regarding the validity, scope, and meaning of Colorado constitution article XVIII. secs. 14 & 16. and may assist a client in conduct that the lawyer reasonably believes is permitted by these constitutional provisions and the statutes, regulations, orders, and other state or local provisions implementing them. ln these circumstances, the lawyer shall also advise the client regarding related federal law and policy.[64]

The attorney ethics rules generally applicable to attorneys appearing in federal court are those of the state where the federal court resides. In November 2014, the Colorado Federal District Court expressly opted out of Comment 14.[65] Notably, this did not dissuade Green Earth Wellness Center's attorneys from bringing their client's claims against Atain Specialty Insurance in the Colorado Federal District Court.

Colorado recently adopted multi-jurisdictional practice of law rules that allow attorneys licensed outside Colorado to appear in arbitration proceedings taking place in Colorado.[66] This permissive and open environment in Colorado for foreign attorney practice is potentially a "honey pot" in the context of cannabis. Foreign attorneys practicing law in Colorado are still subject to the ethical rules from their

[63] ABA Model Rules of Prof'l Conduct R. 1.2(d) (Discussion Draft 1983).
[64] Colo. RPC 1.2.
[65] *See* Local Rule D.C. COLO. L. Atty. R. 2(b)(2).
[66] *See* C.R.C.P. 205.1 and 205.2.

"home" jurisdiction or anywhere they are licensed to practice law.[67] A foreign attorney practicing law in Colorado under C.R.C.P. 205.1 or 205.2 representing a cannabis business could very well violate ethical rules applicable to that attorney in other jurisdictions where they are licensed, particularly under ABA Model Rule 1.2(d).[68]

V. CONFIRMATION OF THE ARBITRATION AWARD

In the U.S., once an arbitration award is rendered by an arbitrator, the standard procedure is to seek confirmation of the arbitration award in a court at the seat of the arbitration.[69] Confirmation converts the arbitration award into a court judgment and allows the winning party to seek enforcement of the award using common collections tools such as pattern asset interrogatories, the writ of execution, and writ of garnishment.[70]

The confirmation procedure under the UAA is designed to achieve enforcement without delay or undue expense.[71] The judgment debtor is entitled to notice of the confirmation proceeding, and certain defenses to confirmation may be raised in a motion for *vacatur* of the arbitration award.[72] A persistent question arises here - to what extent does a court have the ability to review an arbitration award, and the associated arbitration proceedings, under a motion for *vacatur*? Does a court have the ability to review any public policy issues during arbitration award confirmation, or is the arbitrator's public policy decision the end of the story?

The most commonly cited case referring to the review of arbitration awards on the grounds of public policy is the 1987 U.S. Supreme Court case *United Paperworkers Int'l Union v. Misco*:

> A court's refusal to enforce an arbitrator's award under a collective-bargaining agreement because it is contrary to public policy is a specific application of the more general doctrine, rooted in the common law, that a court may refuse

[67] Colo. RPC 8.5(a) ("**A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs.**").
[68] *Id.*
[69] Colo. RUAA, *supra* note 45, at § 13-22-222.
[70] Judd Const. Co. v. Evans Joint Venture, 642 P.2d 922 (Colo. 1982).
[71] *See* Kutch v. State Farm Mut. Auto. Ins. Co., 960 P.2d 93, 99 (Colo. 1998).
[72] Colo. RUAA, *supra* note 45, at § 13-22-223.

> to enforce contracts that violate law or public policy . . . That doctrine derives from the basic notion that no court will lend its aid to one who founds a cause of action upon an immoral or illegal act, and is further justified by the observation that the public's interests in confining the scope of private agreements to which it is not a party will go unrepresented unless the judiciary takes account of those interests when it considers whether to enforce such agreements. [citations omitted]. In the common law of contracts, this doctrine has served as the foundation for occasional exercises of judicial power to abrogate private agreements.[73]

At this point, we have returned back to the issue of *who* decides public policy issues? Under *Buckeye*, the view was that public policy fell within the power of the arbitrator to decide, at least as it pertains to the main contract or subject matter of the contract.[74] Why would a court be permitted to review public policy concerns related to the main contract during a vacatur proceeding if the court was not permitted to do so at the outset of the case during enforcement of the arbitration agreement?

Generally, the grounds upon which arbitration awards can be vacated by a court are narrow and primarily involve misconduct by arbitrators or other serious procedural problems with the arbitration process.[75] The entire point of arbitrating is to remove court review of the merits. Both the FAA and the UAA contain limited enumerated grounds for a court to vacate an arbitration award.[76] Notwithstanding these enumerated grounds for court review, there are two traditional common law-based non-statutory grounds for a court to review an arbitration award: (1) manifest disregard of the law, and (2) public policy.[77] However, there is an ongoing debate about whether any independent non-statutory grounds for a court to vacate an arbitration award remain under both the FAA and U.S. state arbitration acts.[78]

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[73] U. Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 43 (1987) (internal citations omitted).
[74] *Buckeye*, 546 U.S. at 445-46.
[75] *Judd Cons.*, 642 P.2d at 924-25.
[76] FAA, *supra* note 38, at § 10; Colo. RUAA, *supra* note 45, at § 13-22-223.
[77] Stephen L. Hayford & Scott B. Kerrigan, *Vacatur: The Non-Statutory Grounds for Judicial review of Commercial Arbitration Awards*, 51 DISP. RESOL. J. 22 (1996).
[78] *See*, *e.g.*, Reid S. Manley & Zachary D. Miller, *Disregarding "Manifest Disregard": The Effect of Hall Street Associates, LLC v. Mattel, Inc. and Its Progeny on the Standard for Arbitral Review*, FDCC Quarterly/Summer 2010.

Although this debate extends back quite some time, *Hall Street Associates v. Mattel*, a 2008 U.S. Supreme Court case, brought the debate to the forefront.[79] In *Hall Street*, the Court appeared to hold that *all* non-statutory grounds for a court to vacate an arbitration award had been eliminated under the FAA stating that: "Sections 10 and 11 respectively provide the FAA's exclusive grounds for expedited *vacatur* and modification of arbitration awards."[80] *Hall Street* only addressed the "manifest disregard of the law" non-statutory ground for a court to vacate an arbitration award and since then U.S. courts have differed on whether some variation of manifest disregard of the law survives. Notably, the statutory grounds for *vacatur* under both the FAA and UAA do not include public policy and we are left with further questions about the extinction of public policy as a ground for court review as well.

In 2014, the Florida Supreme Court addressed the ability of a court to review an arbitration award for illegality or public policy.[81] The court analyzed *Buckeye Check Cashing*, *United Paperworkers Int'l Union*, and *Hall Street* in determining that under the FAA the courts were foreclosed from reviewing an award on public policy grounds.[82] The Florida Supreme Court surveyed the holdings of other courts since *Hall Street* noting that the Fifth, Seventh, Eighth, and Eleventh Federal Circuit Courts of Appeals have held that the FAA's bases for vacating or modifying an arbitration award cannot be supplemented judicially after *Hall Street*.[83] The Florida Supreme Court held that "courts cannot review the claim that an arbitrator's construction of a contract renders it illegal."[84] Conversely, in June 2017, the Ninth Circuit Court of Appeals issued an unpublished opinion holding that a court may still vacate an arbitration award based on public policy in very narrow exceptions.[85]

This purported end to the public policy ground for review under the FAA has not gone unnoticed. Shortly after *Hall Street*, at least one author has argued that courts

[79] Hall Street Associates, LLC v. Mattel, Inc., 552 U.S. 576 (2008).
[80] *Id.* at 583.
[81] Visiting Nurse Ass'n v. Jupiter Med. Center, 154 So.3d 1115 (Fla. 2014).
[82] *Id.* at 1135.
[83] *Id.* at 1131-32.
[84] *Id.* at 1132.
[85] DeMartini v. Johns, 693 Fed.Appx. 534, 537 (9th Cir. 2017) ("While a court may vacate an arbitration award that is contrary to public policy, this is a very narrow exception.")

"should adopt the public policy exception as an additional ground for *vacatur* under the FAA deriving from their inherent social contract powers."[86]

To steer clear of the ongoing dispute under federal law as to whether public policy and manifest disregard of the law exist as grounds for court review under the FAA, parties are free to agree upon the application of state arbitration law that provides for more narrow or wider grounds for vacatur.[87] The Colorado Court of Appeals has held: "[t]he parties may agree in certain circumstances that an arbitration dispute will be governed by a state arbitration law rather than the FAA."[88] *Hall Street* itself echoes this important principle of party autonomy:

> In holding that §§ 10 and 11 provide exclusive regimes for the review provided by the statute, we do not purport to say that they exclude more searching review based on authority outside the statute as well. The FAA is not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope is arguable.[89]

Colorado courts are strictly limited in their ability to review an arbitration award under the Colorado Uniform Arbitration Act.[90] Additionally, "there is a heavy burden on a party attacking an arbitration award."[91] Courts are prohibited from any sort of *de novo* review of an arbitration award.[92] The Colorado Court of Appeals has also stated that "an arbitration award is not open to review on the merits [and that] the merits of the award include the arbitrators' interpretation of a contract."[93]

In this context, the Colorado courts have affirmed that "[p]ursuant to the express language of the UAA, the party seeking to set aside an arbitration award must assert one of the enumerated grounds for relief or the award will be affirmed."[94] Under

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[86] Jonathan A. Marcantel, *The Crumbling Difference Between Legal and Illegal Arbitration Awards: Hall Street Associates and the Waning Public Policy Exception*, 14 FORDHAM J. CORP. & FIN. L., 597 (July 17, 2008).
[87] *Hall Street*, 552 U.S. at 590.
[88] 1745 Wazee LLC v. Castle Builders, Inc., 89 P.3d 422, 424 (Colo. App. 2003), *cert. denied* (citing Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995); Volt Info. Scis. Inc. v. Bd. Of Trs. Of Leyland Stanford Junior Univ., 489 U.S. 468 (1989)).
[89] *Hall Street*, 552 U.S. at 590.
[90] *Judd Cons.*, 642 P.2d at 924.
[91] Farmers Ins. Exch. v. Taylor, 45 P.3d 759, 761 (Colo. App. 2001).
[92] *See* State Farm Mut. Auto. Ins. Co. v. Broadnax, 827 P.2d 531, 527 (Colo. 1992).
[93] Container Tech. Corp. v. J. Gadsden Pty., Ltd., 781 P.2d 119, 121 (Colo. App. 1989).
[94] *Byerly*, 996 P.2d at 775 (citing § 13-22-214, C.R.S. 1999; Red Carpet Armory Realty Co. v. Golden West

C.R.S. § 13-22-222, a "court *shall* issue a confirming order unless the award is . . . vacated pursuant to section 13-22-223."[95] The grounds for *vacatur* under C.R.S. § 13-22-223 include:

> (1) ...
> (a) The award was procured by corruption, fraud, or other undue means;
> (b) There was:
> (I) Evident partiality by an arbitrator appointed as a neutral arbitrator;
> (II) Corruption by an arbitrator; or
> (III) Misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;
> (c) An arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to section 13-22-215, so as to prejudice substantially the rights of a party to the arbitration proceeding;
> (d) An arbitrator exceeded the arbitrator's powers;
> ...
> (1.5) Notwithstanding the provisions of subsection (1) of this section, the fact that the relief was such that it could not or would not be granted by a court of law or equity is not grounds for vacating or refusing to confirm the award.[96]

The above passage is from Colorado's current *Revised* Uniform Arbitration Act, which was adopted in 2004.[97] Interpreting the confirmation and *vacatur* provisions of the earlier Colorado Uniform Arbitration Act, the Colorado Supreme Court has held: "The meaning of this provision is clear. The *only permitted defenses* to a request for confirmation of an arbitration award are those outlined in sections 214 and 215, and they must be made within specified time limits."[98]

Parties occasionally attempt to fit manifest disregard of the law into the arbitrators "exceeded their powers" defense.[99] The Colorado Court of Appeals has rejected this approach holding that "[w]e decline to adopt an arbitrator's manifest disregard of the law as a ground for vacating an arbitration award under the CUAA,

Realty, 644 P.2d 93 (Colo. App. 1982)).
[95] C.R.S. § 13-22-222 (emphasis added).
[96] C.R.S. § 13-22-223(1), (1.5).
[97] 2004 Colo. Legis. Serv. Ch. 363 (H.B. 04–1080) (WEST).
[98] State Farm Mut. Auto. Ins. Co. v. Cabs, Inc., 751 P.2d 61, 65 (Colo. 1988) (emphasis added).
[99] Coors Brewing v. Cabo, 114 P.3d 60, 63 (Colo. App. 2004).

either as arising from former § 13–22–214(1)(a)(III) or as a non-statutory common law ground."[100] Although *Coors Brewing v. Cabo* and *State Farm v. Cabs* were decided under provisions of Colorado's earlier Uniform Arbitration Act,[101] there is no reason to believe that these holdings would not apply equally to the new Colorado Revised Uniform Arbitration Act.

The arbitrators "exceeding their powers" defense is frequently cited by challenging parties as the ground upon which manifest disregard of the law or public policy may fall under,[102] and therefore the question arises as to the meaning of this defense. Courts have interpreted this defense recognizing that "[t]he arbitrators do not exceed their powers by rendering a decision that is contrary to the rules of law that would have been applied by a court, so long as there is no violation of an express term of the agreement to arbitrate."[103] The fact that the relief was such that it could not or would not be granted by a court of law or equity is not grounds for vacating or refusing to confirm the award.[104] In this context, "Colorado law affords an arbitrator great flexibility in fashioning appropriate remedies."[105] Therefore, under Colorado arbitration law, an arbitrator's failure to accurately apply facts to the law is not a ground for vacating an award.[106]

This is not to say that public policy has never been applied by Colorado state courts during confirmation of an arbitration award. In the event the FAA applies, due to the lack of a specific agreement by the parties for state arbitration law to apply and an interstate commerce connection, then public policy review may still occur. Not long before *Hall Street*, the Colorado Court of Appeals held: "To be overturned on the ground that it violates public policy, an arbitration award must create an 'explicit

[100] *Id.*
[101] C.R.S. § 13-22-201 et seq. (1956).
[102] Michael H. LeRoy, *Are Arbitrators Above the Law? The "Manifest Disregard of the Law" Standard*, 52 B.C. L. REV. 137 (2011); Hiro N. Aragaki, *The Mess of Manifest Disregard*, 119 YALE L.J. ONLINE 1 (2009), http://yalelawjournal.org/forum/the-mess-of-manifest-disregard; *See Schafer v. Multiband Corp.*, 551 F. App'x 814, 819 n.1 (6th Cir. 2014); *Wachovia Sec., LLC v. Brand*, 671 F.3d 472, 480 (4th Cir. 2012); *Comedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277, 1290 (9th Cir. 2009); *Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*, 548 F.3d 85, 95 (2d Cir. 2008), *overruled on other grounds*, 559 U.S. 662 (2010).
[103] *Byerly*, 996 P.2d at 774 (citing Giraldi v. Morrell, 892 P.2d 422 (Colo. App. 1994)).
[104] C.R.S. § 13-22-223(1.5).
[105] R.P.T. of Aspen, Inc. v. Innovative Commc'ns, Inc., 917 P.2d 340, 343 (Colo. App. 1996).
[106] *See* Cabus v. Dairyland Ins. Co., 656 P.2d 54, 56 (Colo. App. 1982).

conflict with other laws and legal precedents,' keeping in mind the admonition that an arbitration award is not to be lightly overturned.'"[107] The court added that "[t]he public policy exception is narrow."[108]

To the extent parties wish to remove federal court jurisdiction over the arbitration process in favor of state courts, language may be added to the arbitration agreement providing for exclusive jurisdiction by the state courts under the state arbitration act and include waivers of the right of removal to the federal courts:

> The parties submit and consent to the *exclusive* jurisdiction of the state courts in the City and County of Denver, State of Colorado, USA to compel arbitration, to confirm an arbitration award or order, or to handle other court functions permitted under the Colorado Revised Uniform Arbitration Act.
> The parties expressly waive any right of removal to the United States federal courts, and the parties expressly waive any right to compel arbitration, to confirm any arbitral award, or to seek any aid or assistance of any kind in the United States federal courts.[109]

Proving the public policy defense remains difficult.[110] Even if a Colorado court considers public policy as an argument for *vacatur*, the Colorado state and Colorado Federal District Court decisions addressed in section II of this article persuasively hold that cannabis-related contracts, otherwise in compliance with Colorado state law, are enforceable and are not against public policy.[111] However, the aforementioned public policy decisions are all money judgments.[112] A different situation may present itself when considering the possible practical effects of an arbitration award that includes equitable relief. This is one key reason to seriously question whether public policy remains in some form as a ground for a court to vacate

[107] 1745 *Wazee* LLC, 89 P.3d at 425-26 (citing Seymour v. Blue Cross/Blue Shield, 988 F.2d 1020, 1024 (10th Cir. 1993) (quoting U. Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 43 (1987))).
[108] *Id.* at 426.
[109] *See* David S. Coale, Rebecca L. Visosky, & Diana K. Cochrane, *Contractual Waiver of the Right to Remove to Federal Court: How Policy Judgments Guide Contract Interpretation*, 29 REV. LITIG. 2 (2010), available at http://600camp.com/wp-content/uploads/2012/01/Right-to-Remove-Article.pdf; William E. Marple & Andrew O. Wirmani, *Waiver of the Right to Remove in Forum Selection Clauses Subject to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 62 MERCER L. REV. (2011), available at http://www2.law.mercer.edu/lawreview/getfile.cfm?file=62202.pdf.
[110] 1745 *Wazee*, 89 P.3d at 425-26.
[111] *See supra* § II.
[112] *Id.*

an arbitration award.

VI. CONFIRMATION OF ARBITRATION AWARDS GRANTING EQUITABLE RELIEF

In *United Paperworkers*, a union member, Mr. Isiah Cooper, worked the night shift at a Misco plant in Monroe, Louisiana where he "operated a slitter-rewinder machine, which uses sharp blades to cut rolling coils of paper."[113] Mr. Cooper was discharged by the company not long after he reported to the company that he had been arrested for possession of cannabis at home.[114] The dispute was subject to arbitration under a collective bargaining agreement. Misco claimed that Mr. Cooper violated company policy by possessing cannabis on company property.[115] During the arbitration hearing, a dispute arose related to when the company became aware of Mr. Cooper's cannabis use on company property.[116] Mr. Cooper argued that the company became aware of his possession of cannabis on company property only five days before the arbitration hearing.[117] In other words, the cannabis use looked like a pretext for Mr. Cooper's firing. The arbitrator found against Misco and ordered that Mr. Cooper be reinstated with full back-pay and seniority despite his known cannabis use.[118]

Misco sought to vacate the arbitration award on the basis that the "arbitrator committed grievous error in finding that the evidence was insufficient to prove that Cooper had possessed or used marijuana on company property."[119] The Fifth Circuit Court of Appeals affirmed the Federal District Court for the Western District of Louisiana vacating the arbitration award.[120] The appeals courts held that "the evidence of marijuana in Cooper's car required that the award be set aside because to reinstate a person who had brought drugs onto the property was contrary to the public policy 'against the operation of dangerous machinery by persons under the influence of drugs or alcohol.'"[121] The U.S. Supreme Court reversed the decision of

[113] *U. Paperworkers*, 484 U.S. at 32.
[114] *Id.* at 33.
[115] *Id.*
[116] *Id.* at 34.
[117] *Id.* at 33-34.
[118] *Id.* at 34.
[119] *Id.* at 39.
[120] *Id.* at 34-35.
[121] *Id.* at 42 (quoting Misco, Inc. v. U. Paperworkers Int'l Union, AFL-CIO, 768 F.2d 739 (5th Cir. 1985)).

the Fifth Circuit by holding that "[h]ad the arbitrator found that Cooper had possessed drugs on the property, yet imposed discipline short of discharge because he found as a factual matter that Cooper could be trusted not to use them on the job, the Court of Appeals could not upset the award because of its own view that public policy about plant safety was threatened."[122]

One notable case by the Colorado Supreme Court may have an impact on the enforcement of equitable relief in Colorado. In *People v. Crouse*, the court held that a provision of the Colorado Constitution requiring law enforcement to return medical cannabis to an acquitted defendant was in positive conflict with the CSA and could not be enforced.[123] Although this case was not decided on public policy grounds, it does demonstrate how the courts may be reluctant to require law enforcement to engage in any activities that directly conflict with the express provisions of the CSA, namely, the distribution of cannabis.

To the extent public policy remains as a ground for vacatur, *United Paperworkers* and *DeMartini* demonstrate that public policy will still be narrowly construed by the courts.[124] However, arbitration is still a creature of contract and, although an arbitrator obtains his or her authority from the consent of the parties, other third-parties have *not* consented to an arbitrator having any authority over them. In this sense, "public" policy remains in play. Ordering Misco to reinstate Mr. Cooper to his position operating a dangerous machine is one thing; Misco agreed to resolve such disputes in arbitration after all. But ordering third-parties to do something that is potentially illegal or unsafe is quite another. As demonstrated in *Crouse*, law enforcement may resist an order that they believe to be in conflict with federal law. Perhaps there is some room for public policy review still, but only within a specific context. Where an arbitration award contains equitable remedies, particularly injunctive or specific performance relief that affects third-parties not party to the arbitration, the justification for a court to simply accept an arbitrator's determination on public policy issues crumbles.

[122] *Id.* at 45.
[123] People v. Crouse, 388 P.3d 39 (Colo. 2017).
[124] *U. Paperworkers*, 484 U.S. at 42-43.

As demonstrated below, the rationale behind this idea is also reflected in the limits of interstate enforcement of state court judgments under the Full Faith and Credit Clause of the U.S. Constitution.

VII. INTERSTATE ENFORCEMENT OF THE CONFIRMED ARBITRATION AWARD (NOW A STATE COURT JUDGMENT) – THE FULL FAITH AND CREDIT CLAUSE

Once an arbitration award is confirmed by a state court at the "seat" of the arbitration, it is converted into a state court judgment.[125] Then, a party may seek to enforce the court judgment in a sister state under the Full Faith and Credit Clause of the U.S. Constitution, sometimes referred to as the "Iron Law."[126] The U.S. Supreme Court has held that "[t]he full faith and credit clause is one of the provisions incorporated into the Constitution by its framers for the purpose of transforming an aggregation of independent, sovereign States into a nation."[127] In other words, the clause is part of the glue that holds the U.S. states together.

Courts in an enforcing jurisdiction apply local procedure, but the confirmed award – a judgment - has full *res judicata* effect in enforcing states.[128] As the U.S. Supreme Court stated in *Baker by Thomas*, the enforcing state cannot meddle with the judgment:

> As to judgments, the full faith and credit obligation is exacting. A final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land. A court may be guided by the forum State's "public policy" in determining the law applicable to a controversy, but this Court's decisions support no roving "public policy exception" to the full faith and credit due judgments ... .[129]

To what extent can a sister state court review another state court judgment under the Full Faith and Credit Clause? There are a few exceptions to the general rule of enforceability: foreign judgments affecting disposition of real property in an enforcing state and a few other areas such as the cross-border effect of injunctions.

[125] C.R.S. § 13-22-222; Judd Const. Co. v. Evans Joint Venture, 642 P.2d 922 (Colo. 1982).
[126] William L. Reynolds, *The Iron Law of Full Faith and Credit*, 53 MD. L. REV. 412 (1994).
[127] Sherrer v. Sherrer, 334 U.S. 343, 355 (1948).
[128] Baker by Thomas v. Gen. Motors, 522 U.S. 222, 233-35 (1989).
[129] *Id.* at 246.

State courts however cannot consider the *illegality* of the contract when considering whether to recognize and enforce the foreign sister state court judgment.[130]

Although the Iron Law remains strong in the context of money judgment enforcement, the analysis changes when the relief sought to be enforced affects third-parties.[131] In *Baker by Thomas*, a former General Motors engineering analyst agreed, during the settlement of employment claims, not to testify anywhere in the U.S. against General Motors in other cases.[132] A Michigan state court adopted the stipulation between the employee and General Motors as an order of the court in the form of a permanent injunction.[133] The U.S. Supreme Court was asked whether such an injunction was binding on a Missouri state court involving third-parties.[134] The U.S. Supreme Court distinguished between the enforcement of money judgments, and the judgment's claim and issue preclusive effects *on the parties*, and other types of relief:

> Enforcement measures do not travel with the sister state judgment as preclusive effects do; such measures remain subject to the evenhanded control of forum law . . . Orders commanding action or inaction have been denied enforcement in a sister State when they purported to accomplish an official act within the exclusive province of that other State or interfered with litigation over which the ordering State had no authority.[135]

Accordingly, an arbitrator's order commanding a party to specifically perform the contract and deliver a supply of cannabis, if confirmed and converted into a state court judgment in Colorado, may or may not be enforceable in sister states under the Full Faith and Credit Clause.[136] Ultimately, the court in the enforcing jurisdiction will have wider latitude to deny enforcement in accordance with the law of the enforcing jurisdiction.

[130] *Id.* at 236-37; Fauntleroy v. Lum, 210 U.S. 230 (1908).
[131] *Baker*, 522 U.S. at 248-49.
[132] *Id.* at 227-28.
[133] *Id.*
[134] *Id.* at 231.
[135] *Id.* at 235.
[136] *Id.*

VIII. CONCLUSION

The enforceability of cannabis-related contracts will likely remain in a gray area for some time; however, effective contract enforcement techniques do exist for those willing to engage in this industry. As demonstrated above, the choice of law and choice of forum are significant parts of the enforceability analysis. Colorado state public policy and recent decisions from the state and federal courts in Colorado enforcing cannabis-related contracts demonstrate one promising forum for contract enforcement. The selection of arbitration as the forum for dispute resolution reduces the extent to which public courts can apply public policy and illegality arguments to defeat the contract. Where a money judgment is involved, as opposed to injunctive relief, the Full Faith and Credit Clause also provides a promising avenue for interstate enforcement of a state court judgment that confirms a cannabis-related arbitration award.

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MASS PROCEEDINGS IN THE INVESTOR-STATE ARBITRATION SETTING: OFFSPRING OF LEGAL GENETIC ENGINEERING?

by Marine Koenig

I. INTRODUCTION

Globalization has increased the possibility of widespread legal harm.[1] Over the past decades, Argentina's sovereign debt crisis, its default, and its subsequent restructuring have offered a prime example of this. In its aftermath, Argentina's sovereign debt crisis has left thousands of aggrieved bondholders with a multiplicity of claims of relatively small amounts and a debate regarding the appropriate means to address them.

International dispute resolution bodies face an increasing number of claims of small amounts arising under international law.[2] The investor-State arbitration system is no exception. In order to give effect to substantive norms, procedural devices have been considered appropriate means to address widespread legal harm. Within the investor-State arbitration framework, this has taken the form of mass proceedings.

The debate regarding mass proceedings emerged with the noteworthy decision on admissibility and jurisdiction in *Abaclat*.[3] The *Abaclat* award was shortly followed by two sister cases, *Ambiente*[4] and *Alemanni*,[5] dealing with substantially similar legal and procedural patterns.

This paper addresses the emergence of mass proceedings within the investor-State arbitration framework. This phenomenon has been regarded as one of the most noteworthy developments of investment law over the past decade. Although the

[1] *See generally* Stacie I. Strong, *Chapter 10. Class Arbitration Outside the United-States: Reading the Tea Leaves*, *in* MULTIPARTY ARBITRATION, Vol. 7, 183-213 (Eric A. Schwartz & Bernard Hanotiau eds. 2010).
[2] Friedrich Rosenfeld, *Mass Claims in International Law*, 4 J. INT'L DISP. SETTLEMENT 159, 159 (2013).
[3] Abaclat & Others v. The Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (Aug. 4, 2011).
[4] Ambiente Ufficio S.P.A. et al. v. The Argentine Republic, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility (Feb. 8, 2013).
[5] Giovanni Alemanni et al. v. The Argentine Republic, ICSID Case No. ARB/07/8, Decision on Jurisdiction and Admissibility (Nov. 17, 2014).

subject has given rise to an extensive literature, all commentators agree on the novelty of this procedural device in the investor-State arbitration system, which is explored herein.

Section II exposes the legal framework set up by the Argentinean trilogy of awards. Section III then proposes a taxonomy of mass proceedings. Section IV stresses the conceptual importance to distinguish jurisdiction from admissibility. Section V discusses the main jurisdictional issue: consent. Section VI sets out the specific methodology developed to address mass claims admissibility. Lastly, Section VII closes out the aforementioned presentation with some final remarks.

II. THE LEGAL FRAMEWORK: THE ARGENTINIAN TRILOGY

In 2001, Argentina defaulted on its repayment obligations on its sovereign debt, including bonds owned by Italian citizens. Consequently, three claims were lodged by bondholders at the International Centre for Settlement of Investment Disputes ("ICSID")[6] under the Agreement between the Argentine Republic and the Republic of Italy on the Promotion and Protection of Investments, signed in Buenos Aires on May 22, 1990 ("Argentina-Italy BIT" or the "BIT"), the *Abaclat*, *Ambiente*, and *Alemanni* cases.

The decisions on admissibility and jurisdiction in the *Abaclat*, *Ambiente*, and *Alemanni* cases form a set of three consistent awards. The tribunal in *Ambiente* referred to the *Abaclat* decision regarding the factual background,[7] and it did so more generally "whenever appropriate."[8] According to the tribunal, this referral was justified by the "substantial overlap of the questions of fact and law the two Tribunals are confronted with in their respective cases."[9] In an extensive quote, the *Alemanni* award recycles the *Ambiente* reference to the *Abaclat* award.[10]

All three tribunals considered that they had jurisdiction over the claims brought

[6] The International Centre for Settlement of Investment Disputes was established by the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, T.I.A.S. 6090, 575 U.N.T.S. 159 [hereinafter "ICSID Convention"], and entered into force in 1966, when it had been ratified by 20 state members of the World Bank.
[7] *Ambiente*, ¶ 61.
[8] *Id.*
[9] *Id.* ¶ 11.
[10] *Alemanni*, ¶ 255.

before them and allowed the cases to proceed on the merits. The main difference between the three cases is the number of claimants: *Abaclat* involved 60,000 investors, whereas *Ambiente* and *Alemanni* involved, respectively, 90 and 74 aggrieved bondholders.

Although there is no binding precedent within the ICSID framework,[11] and flexibility is praised as one of the main features of the system, there is a need for consistency that results in persuasive precedents. As acknowledged by Professor Gabrielle Kaufmann-Kohler, "in investment arbitration, there is a progressive emergence of rules through lines of consistent cases on certain issues."[12] The *Abaclat*, *Ambiente*, and *Alemanni* decisions form a line of consistent cases regarding mass claim proceedings, the analysis of which provides us with a better understanding of what might be a guiding framework of persuasive precedent in investment arbitration.

Analysis of mass proceedings in investment arbitration calls for a comprehensive taxonomy in order to determine the common features shared with other similar proceedings developed within the international and domestic frameworks.

III. TAXONOMY OF MASS PROCEEDINGS

The tribunal in *Abaclat* referred to "mass proceedings" as a "qualification for the present proceedings … referring simply to the high number of Claimants appearing together as one mass, and without any prejudgment on the procedural classification of the present proceedings as a specific kind of collective proceedings recognized under any specific legal order."[13] This terminology had been used in public international law, and the examination of mass claims processes helps in understanding the procedural device used in international investment arbitration. Eventually, it allows the characterization of mass proceedings in the international investment arbitration framework.

A. *Lessons from Public International Law: International Mass Claim Processes*

[11] RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 36 (2008).
[12] Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse*, 23 J. INT'L ARB. 357, 357 (2007).
[13] *Abaclat*, ¶ 480.

The *Abaclat*, *Ambiente*, and *Alemanni* decisions exemplify the mass proceedings in investment arbitration; however, mass claim processes are well-known procedural devices in public international law. The use of mass claim processes can be traced back to the Jay Treaty in 1794, which established two commissions to address a large number of claims by US and British citizens.[14]

Mass claim processes traditionally refer to the "numerosity of claims which have some 'commonality of legal and factual issues' but which are decided individually."[15] Usually they involve the creation of a specific adjudicative body.[16] To that extent, mass claim processes differ from mass claims arising within the investment context. The latter have taken the form of procedural devices that bind claims in order to bring them in the form of a single substantive claim before the arbitral forum.[17]

Mass claim processes provide a better understanding of mass claim proceedings in international investment arbitration. Both fall within the functional definition of "streamlined procedure[s] which allows processing a high number of claims arising from a violation of international law that raise common factual and/or legal questions."[18] Mass processes show features analogous to mass claim proceedings. Their constituting methods and instruments range from treaties[19] to arbitration agreements.[20] The nature of the proceedings has, in some instances, been similar to

[14] HOWARD M. HOLTZMANN & EDDA KRISTJANSDOTTIR, INTERNATIONAL MASS CLAIMS PROCESSES: LEGAL AND PRACTICAL PERSPECTIVES 2-3 (2007).
[15] Hans Van Houtte & Bridie McAsey, *Case Comment - Abaclat and Others v. Argentine Republic, ICSID, the BIT and Mass Claims*, 27 ICSID REV., 231, 231-32 (2012) (citing HANS DAS & HANS VAN HOUTTE, POST-WAR RESTORATION OF PROPERTY RIGHTS UNDER INTERNATIONAL LAW II 23-5 (2008)); *see also Abaclat*, Dissenting Opinion of Professor Georges Abi-Saab, ¶¶ 182-83 ("If we examine all the examples of international mass claims programs ... we note the following common major features that distinguish them from the present case: ... a) Each one of them, without exception, was specifically established to process a particular set of mass claims. None of them was set in motion by an application to a standing Tribunal, or on the basis of a prior compromissory clause (or another prior jurisdictional title) as in the present case.").
[16] *See* VAN HOUTTE & MCASEY, *supra* note 15, at 231-32; *Abaclat*, Dissenting Opinion, ¶¶ 182-83.
[17] STACIE I. STRONG, CLASS, MASS, AND COLLECTIVE ARBITRATION IN NATIONAL AND INTERNATIONAL LAW 342 (2013).
[18] ROSENFELD, *supra* note 2, at 2.
[19] For example, the Iran-United States Claims Tribunal was created by a declaration by the Islamic Republic of Iran and the United States of America. It provides that the Tribunal would conduct the proceedings according to the UNCITRAL Arbitration Rules.
[20] For example, the Claim Resolution Tribunal for Dormant Accounts in Switzerland was established by an agreement to arbitrate between the Swiss Bankers Association and two leading Jewish organizations. Its purpose was to resolve claims to accounts in Swiss banks that had been dormant since the Second World War.

arbitration.[21] The main elements drawn from the variety of mass claim processes that are helpful to further this analysis are the procedural techniques used to deal with the numerosity of claimants.[22]

In his dissent from the *Abaclat* majority, Professor Georges Abi-Saab uses mass claim processes to support his showing that there is a need for consent by all parties "to establish a mechanism with jurisdiction to process a particular set of mass claims - or collaterally, to endow an already existing body or framework with such jurisdiction - and to devise the procedures for so doing."[23] Not only does he offer a biased reading of the great variety of mass processes, but he also limits their relevance to the consent issue alone, whereas they can be helpful to develop mass claims proceedings to a broader extent.

The heterogeneity of mass claim processes established have not led to the emergence of a single standard that can be relied upon.[24] However, the techniques used can be a basis for mass claim mechanisms in international investment arbitration, if tailored to the specificities of the investment framework.[25]

B. *Mass Proceedings in the International Investment Framework*

In departing from preexisting procedural devices such as multiparty proceedings, the three tribunals dealing with Argentina's sovereign debt crisis have cautiously rejected preexisting terminology, including the technical reference to "mass proceedings." However, this has not impaired the descriptive relevance of "mass proceedings" to refer to the hybrid, multiparty proceedings developed in the international investment setting.

1. Are Mass Proceedings the Heir of the Multiparty Proceedings?

Multiparty proceedings have long been recognized within the ICSID framework.[26]

[21] As an example, the Iran-United States Claims Tribunal's constituting instrument provides that the Tribunal shall conduct the proceedings according to the UNCITRAL Arbitration Rules.
[22] *See* HOLTZMANN & KRISTJANSDOTTIR, *supra* note 14, at 2-3.
[23] *Abaclat*, Dissenting Opinion, ¶ 189.
[24] ROSENFELD, *supra* note 2, at 159.
[25] *Id.*
[26] *See, e.g.*, Antoine Goetz et al. v. Republic of Burundi, ICSID Case No. ARB/95/3, Award (Feb. 10, 1999); Bayview Irrigation District et al. v. Mexico, ICSID Case No. ARB(AF)/05/1, Award (Jun. 19 2007); Funnekotter v. Republic of Zimbabwe, ICSID Case No. ARB/05/6, Award (Apr. 7, 2009); Anderson v. Republic of Costa Rica, ICSID Case No. ARB/(AF)/07/3, Award (May 10, 2011).

The majority in the *Ambiente* award qualifies them as "a common feature in ICSID arbitration."[27]

Multiparty proceedings before ICSID tribunals can be divided into two subcategories. The first subcategory encompasses multiple arbitral proceedings that are separately and individually launched, and later joined or consolidated in a single multiparty proceeding.[28] The second subcategory designates proceedings that are originally filed as multiparty actions, *i.e.*, the submission of one claim by a plurality of claimants in one single proceeding.[29] The *Abaclat*, *Ambiente*, and *Alemanni* mass proceedings fall within the latter subcategory.

It is worth noting that, before the *Abaclat* case, no State had ever objected to the jurisdiction of arbitral tribunals over claims brought by multiple parties or those claims' admissibility on the ground that they were improper within the ICSID arena. The *Klöckner v. Cameroon*[30] case stands as an exception where the respondent State raised an argument relying on the wording of Article 25(1) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention").[31] The Republic of Cameroon alleged that Article 25(1) excluded multiparty arbitration. This objection was ultimately dropped.[32]

The *Abaclat*, *Ambiente*, and *Alemanni* mass proceedings appear to be a new form of multiparty proceeding, which raises questions about the alleged novelty of the debate about mass proceedings.

2. Mass Proceedings a Descriptive Rather than Normative Terminology

In the *Abaclat* award, the tribunal refers to the concept of mass proceedings to qualify the high number of claims appearing together as one "mass." It therefore rejects the use of said terminology to refer to any specific kind of multiparty

[27] *Ambiente*, ¶ 135.
[28] Stacie I. Strong, *Case Comment - Ambiente Ufficio SpA and others v Argentine Republic, Heir of Abaclat? Mass and Multiparty Proceedings*, 29 ICSID REV. 149, 150 (2014) [hereinafter STRONG *Ambiente*]; *Ambiente*, ¶ 123.
[29] STRONG *Ambiente*, *supra* note 28, at 149; *Ambiente*, ¶ 124.
[30] Klöckner Industrie-Anlagen GmbH et al v. U. Republic of Cameroon & Société Camerounaise des Engrais, ICSID Case No. ARB/81/2, Award (Oct. 21, 1983).
[31] ICSID Convention, art. 25.
[32] *Ambiente*, ¶ 136; *Abaclat*, Dissenting Opinion.

proceeding.[33] The *Ambiente* majority goes further, rejecting the use of the term "mass proceeding" as non-technical[34] in order to avoid any linguistic ambiguity and potential confusion carried out by its use.[35] Ultimately, the *Alemanni* tribunal ended the debate stating that it "sees no advantage whatsoever in entering into a battle of terminology."[36]

The cautious refusal of two of the three tribunals to use the term "mass proceedings," even in a descriptive way, shows their willingness to depart from preexisting procedural patterns. In this regard, the *Ambiente* tribunal explains its concern that the use of a preexisting terminology be used as a basis "to import aspects into the ICSID framework which are associated with concepts deriving from the court litigation and arbitration regime of domestic laws ... or other areas of international law, which might bear the same name but may well have a technical meaning different from, or even incompatible with, the legal framework set up by the ICSID Convention."[37] This does not prevent the use of this terminology to describe the procedural device developed through this set of cases. It does, however, leave open the technical characterization of said proceedings.

3. Characterization of Mass Proceedings

Out of the three cases, the *Abaclat* award is the only one that enters the debate as to the characterization of mass proceedings. The *Alemanni* and *Ambiente* awards take the same position: they do not attempt to characterize the nature of the mass proceedings but expressly reject any representative features.[38] However, due to the common characteristics of the three cases, the *Abalcat* analysis is useful as a clear presentation of mass claims in investment arbitration.

The *Abaclat* majority starts with a comparison between mass and representative proceedings. It emphasizes how the conduct of the proceedings resembles a

[33] *Abaclat*, ¶ 480.
[34] *Ambiente*, ¶ 119.
[35] *Id.* ¶ 120.
[36] *Alemanni*, ¶ 267.
[37] *Ambiente*, ¶ 121.
[38] *Id.* ¶ 115; *Alemanni*, ¶ 267.

representative action where a numerosity of claims arises as one claim.[39] However, contrary to classic representative class arbitration proceedings, a third party represented the claimants in this case.[40] The representative made decisions on behalf of all claimants regarding the conduct of the proceedings, which is a feature of representative proceedings.[41]

The *Abaclat* majority then focuses on the aggregate element. The majority finds this element in the claimants' individual and conscious choice of participating in the arbitration.[42] It is finally emphasized that those two kinds of proceedings share a common *raison d'être*: they "emerge[] where they constituted the only way to ensure an effective remedy in protection of a substantive right provided by contract or law."[43] Eventually, the majority characterizes the proceeding as hybrid in nature, "in the sense that … [the arbitration] starts as aggregate proceedings, but then continues with features similar to representative proceedings due to the high number of Claimants involved."[44]

The characterization of the mass proceedings as hybrid in nature is a compromise that allows the *Abaclat* tribunal to depart from the traditional US class arbitration scheme while creating a new category in the well-established nomenclature.

The procedural device developed in the *Abaclat*, *Ambiente*, and *Alemanni* awards can be generally qualified as a mass proceeding distinct from the mass processes used in public international law. These mass proceedings represent a type of multiparty proceeding that shares common features with the traditional proceedings developed within the ICSID framework. The nature of the process is neither fully aggregate nor completely representative, hence its qualification as a hybrid proceeding. The tribunals, by avoiding using technical, well-established nomenclature, bypass the concern of preexisting national or international mechanisms having persuasive effect on the developing international investment regime of mass claims.

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[39] *Abaclat*, ¶¶ 483, 488.
[40] *Id.* ¶ 487; VAN HOUTTE & MCASEY, *supra* note 15, at 235.
[41] *Abaclat*, ¶ 487.
[42] *Id.* ¶ 486.
[43] *Id.* ¶ 484.
[44] *Id.* ¶ 488.

IV. THE CONCEPTUAL IMPORTANCE TO DISTINGUISH JURISDICTION FROM ADMISSIBILITY IN MASS CLAIMS PROCEEDINGS

The *Abaclat* award on jurisdiction and admissibility stresses the importance of distinguishing these two concepts.[45] The *Ambiente* and *Alemanni* tribunals also used this dichotomy. However, the *Ambiente* majority once again took a tentative approach, refusing to draw a clear line between two core concepts in order to avoid terminology debates.[46] The *Alemanni* award, synthesizing its sister tribunals' approaches, notes that it is "not convinced that the distinction between the two concepts, such as it may be, raises any major difficulty; but nor is it convinced that the distinction is of any particular importance in disposing of the issues presently before it."[47]

In order to present a comprehensible analysis of the three awards on jurisdiction and admissibility, the distinction is relevant. The guiding question presented by the *Abaclat* majority is helpful in this regard:

> If there was only one Claimant, what would be the requirements for ICSID's jurisdiction over its claim? If the issue raised relates to such requirements, it is a matter of jurisdiction. If the issue raised relates to another aspect of the proceedings, which would not apply if there was just one Claimant, then it must be considered a matter of admissibility and not of jurisdiction.[48]

However, to narrow our analysis, emphasis will be placed first on the main jurisdictional requirement, the parties' consent to arbitration; and second, on the noteworthy methodology developed by the *Abaclat* tribunal to retain mass claims' admissibility notwithstanding the silence of the conventional instruments.

V. JURISDICTION – CONSENT

Following the guiding question of *Abaclat*, our analysis will focus on what has been qualified as the "cornerstone of the Centre jurisdiction:"[49] consent to arbitration.

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[45] *Id.* ¶ 246.
[46] *Ambiente*, ¶ 573.
[47] *Id.* ¶ 257.
[48] *Abaclat*, ¶ 249.
[49] Report of the Executive Directors on The Convention on the Settlement of Investment Disputes between States and Nationals of Other State, Jurisdiction of the Centre, *available at* https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partB-section05.htm.

Consent in international investment arbitration is twofold as it refers to the respondent State's consent, which is the offer to arbitrate, and the claimant's acceptance embodied in the request for arbitration lodged at ICSID. It is noteworthy that the tribunals in *Abaclat*, *Ambiente*, and *Alemanni* developed a double standard to assess the parties' consent.

A. *Respondent's consent to arbitrate*

In investor-State arbitration, the State's consent to arbitrate is constituted by a general consent provided by the State while becoming a party to the ICSID Convention and a specific consent to ICSID jurisdiction for a given dispute. However, a third consent has been envisioned regarding mass proceedings; it has been alleged that a "secondary consent" is necessary for the claims to proceed in the form of a "mass."

1. The General Consent

The general consent is characterized by the State's participation in the ICSID Convention. Article 25 of the ICSID Convention sets up the objective elements required to retain the Centre's jurisdiction. Those are the "outer limits" of its jurisdiction, which are not subject to the parties' disposition.[50] The Convention sets two conditions regarding consent. From a substantive point of view, there must be consent between the parties to submit a specific dispute to the jurisdiction of the Centre. From a formal point of view, written consent of both parties is required.

The question remains as to whether mass proceedings falls within the "outer limits" of the Centre's jurisdiction. The majority in *Alemanni* stressed that the language used in Article 25(1), a "dispute arising directly out of an investment, between a Contracting State … and a national of another Contracting State," should not be construed to mean a "dispute between a Contracting State and one, but only one, national of another Contracting State."[51] Furthermore, Article 25(4) of the ICSID Convention contemplates the possibility for the signatories to "notify the Centre of the class or classes of disputes which it would or would not consider submitting to

[50] CHRISTOPH H. SCHREUER ET AL., THE ICSID CONVENTION: A COMMENTARY 91 (2009).
[51] *Alemanni*, ¶¶ 270-71.

the jurisdiction of the Centre."

As previously explained, multiparty proceedings have been lodged before at ICSID. They are well-known within the ICSID framework; therefore, the signatories should foresee that such proceedings could be brought against them. The language of Article 25 of the ICSID Convention does not exclude multiparty proceedings, and "provided that the jurisdictional limitations as to the parties to proceedings under the Centre are observed, and the consent of all parties concerned is secured, there is no reason why appropriate multi-partite proceeding[s] cannot be carried out pursuant to the Convention."[52]

Argentina did not notify the Centre that it wanted to exclude from the scope of its general consent proceedings involving a numerosity of claimants.[53] Argentina, as a signatory of the ICSID Convention, has provided a general consent according to Article 25 that does not exclude the possibility of multiple claims brought in mass form.

2. The Specific Consent

The specific consent is embodied in the dispute resolution clause contained in the relevant BIT. In the cases at issue, the relevant provision, Article 8(3) of the BIT, reads "with this purpose and under this Agreement, each Contracting Party grants its anticipated and irrevocable consent that any dispute may be subject to arbitration." This offer to arbitrate is an open and standing offer,[54] *i.e.*, a pre-existing consent by the host State to litigate claims arising out of the BIT according to ICSID proceedings. The respondent State's prospective consent to arbitrate is "a procedural guarantee for simulating and protecting foreign investments;"[55] investors can "capitalize" on this consent, as it provides them the opportunity to bring a suit at any time. Prospective

[52] Carolyn B. Lamm et al., *Consent and Due Process in Multiparty Investor-State Arbitrations*, *in* INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 54, 60 (2009) (citing Paul C. Szasz, *The Investment Dispute Convention – Opportunities and Pitfalls (How to Submit Disputes to ICSID)*, 5 J. L. & ECON. DEV. 26, 28 (1970)).

[53] To forecast Argentina's notifications, see https://icsid.worldbank.org/apps/ICSIDWEB/about/Pages/MembershipStateDetails.aspx?state=ST4.

[54] *Alemanni*, ¶ 270.

[55] Andrea M. Steingruber, *Case Comment - Abaclat and Others v. Argentine Republic Consent in Large-scale Arbitration Proceedings*, 27 ICSID REV. 237, 238 (2012).

consent is characteristic of the investment law system as its main purpose is to stimulate foreign investments by guaranteeing substantive and procedural protections.

A respondent State's specific consent is inherently directed to multiple investors as long as their investment falls within the scope of protection of the BIT. Through BITs, States consent to the mandatory arbitration of disputes with foreign investors as a group.[56] Therefore, States should be aware of the possibility of being confronted by multiple claims of protected investors arising out of similar legal and factual patterns.[57]

Contracting States are the drafters of the dispute resolution mechanisms contained in the BITs; they are left with the possibility to exclude a certain type of dispute from its scope. The majority in *Alemanni* noted that "where the consent of the respondent State is in issue, the question for consideration remains simply: on the proper interpretation of the BIT, has the respondent, or has it not, given a consent which is wide enough in scope to cover the proceedings brought (as in the case) by the multiple group of co-claimants."[58] Article 8(3) of the BIT does not exclude disputes brought in mass form. Therefore, as long as the tribunal has jurisdiction over each of the individual claims, there is no reason why it should lose jurisdiction because of the number of claimants.[59]

3. Secondary Consent

In its submissions to the tribunal, Argentina asserted the need for "secondary consent" to allow the claims to proceed on the merits in the form of a "mass."[60] The concept of "secondary" consent, referring to a "particular type of procedure," is supported by the dissenting opinion of Professor Georges Abi-Saab to the *Abaclat* award. It is therein explained that "traditional multiparty arbitrations are … required to establish secondary consent in cases where the arbitration agreements are silent

[56] GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW 62 (2007).
[57] STEINGRUBER, *supra* note 55, at 241.
[58] *Alemanni*, ¶ 269.
[59] *Abaclat*, ¶ 490.
[60] *Id.* ¶ 481; *Alemanni*, ¶¶ 133, 137.

or ambiguous as to multiparty treatment."[61] From this, it follows, according to the dissent, that if this concept applies to multiparty arbitration, it applies *a fortiori* to mass proceedings.[62] The author cited as a reference by the tribunal corrects the biased reading of the original source. In a subsequent article, the same author, Professor Stacie Strong, emphasizes that the dissenting arbitrator had misunderstood the reference to a "secondary" consent as meaning "additional" instead of "subordinate."[63]

In the same subsequent article, Professor Strong explains the "secondary" consent theory of Professor Rau.[64] This theory draws a distinction between matters of primary and secondary concern. Matters of primary concern, which include core questions, should be applied a strict standard of consent. Matters of secondary concern, on the other hand, which include non-core questions, should be applied a less stringent standard of consent. Procedural issues, such as the form of the proceedings, fall within the latter category. A secondary consent, in the sense of "subordinate" consent, should apply to procedural matters. Where applicable the concept of "secondary consent" for particular forms of arbitration has been described as extremely fluid and generally leading to a presumption in favor of consent.[65] It is therefore unsurprising that the tribunals in the *Abaclat*, *Ambiente*, and *Alemanni* cases rejected the need for "secondary" consent.[66]

The first argument on the basis of which the need for "secondary" consent was rejected refers to the nature of the investment. It is developed in the *Abaclat* award. The ICSID Convention aims at promoting and protecting investments. This protection is provided through procedural devices guaranteeing the effectiveness of the substantive protection. Bonds qualify as "protected investments" under the so-called "double-barreled" test, *i.e.*, they meet the definition of investment under the

[61] *Abaclat*, Dissenting Opinion, ¶ 173 (citing Stacie I. Strong, *Does Class Arbitration 'Change the Nature' of Arbitration? Stolt Nielsen, AT&T and Return to First Principles*, 17 HARV. NEGOT. L. REV. 201 (2012))
[62] *Id.* ¶ 174.
[63] STRONG *Ambiente*, *supra* note 28, at 151.
[64] *Id.* (citing Alan Scott Rau, *Arbitral Jurisdiction and the Dimensions of 'Consent'*, 24 ARB. INT'L 199, 203 (2008)).
[65] Ridhi Kabra, *Has Abaclat v Argentina left the ICSID with a 'mass'ive problem?*, 31 ARB. INT'L 425, 427 (2015).
[66] *Abaclat*, ¶ 490.

BIT[67] and Article 25 of the ICSID Convention.[68] They are instruments which by nature are likely to involve, in the context of the same investment, a high number of investors.[69] Therefore, it would be contrary to the purpose of the ICSID Convention and the BIT "to require in addition to the consent to ICSID arbitration in general, a supplementary express consent to the form of such arbitration."[70]

The second argument on the basis of which the need for a "secondary" consent was rejected contemplates the nature of the proceedings. As noted by the *Ambiente* majority, when confronted with a situation of *ex post* joinder of separate claims or consolidation of individual actions, there is a need for an additional consent.[71] However, the cases at stake relate to none of those situations but are characterized by the submission of a claim by a plurality of claimants in one single ICSID proceeding.[72] The institution of such proceeding does not require any "secondary" consent on the part of the respondent State beyond the general requirements of consent to arbitration.[73]

In the *Abaclat***,** *Alemanni*, and *Ambiente* awards, the tribunals characterized both the general and specific consent given by Argentina. The need for "secondary" consent purportedly incurred by the "mass" aspect of the claims was rejected. However, the "mass" aspect of the claims raises specific issues regarding the claimants' consent.

B. *The Claimants' Consent to Arbitrate*

The characterization of a claimant's consent to arbitrate is generally not a complicated issue in ICSID arbitration as it follows a well-established pattern. However, the scheme of representation in the Argentinean trilogy, along with the power of attorney mechanism, gave rise to concerns regarding its validity.

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[67] *Id.* ¶¶ 356, 361.
[68] *Id.* ¶ 367.
[69] *Id.* ¶ 490. For an explanation about the qualification of bonds as investments in the *Abaclat* and *Ambiente* cases, *see* Tomokos Ishikawa, *Keeping Interpretation in Investment Treaty Arbitration 'on Track': The Role of State Parties*, *in* RESHAPING THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM: JOURNEYS FOR THE 21ST CENTURY 115, 117-22 (Jean E. Kalicki & Anna Joubin-Bret eds. 2015).
[70] *Abaclat*, ¶ 490.
[71] *Ambiente*, ¶ 123.
[72] *Id.* ¶ 124.
[73] *Id.* ¶ 141.

1. Characterization of the Claimants' Consent within the ICSID Framework

Within the ICSID arena, and according to Article 25's jurisdictional requirements, a claimant's written consent is given through initiation of the proceedings. The commencement of the proceedings constitutes the acceptance by the investor of the host State's offer to arbitrate, thus perfecting the consent. According to Article 36 of the ICSID Convention, the request for arbitration must be submitted in writing. The established practice is that the request embodies the consent of the investor[74] satisfying the writing requirements of Article 25(1) and Article 36.

The ICSID Institution Rules[75] contemplate the possibility for the request to be filed by the claimant's duly authorized representative.[76] The power of attorney establishes a link between the claimants and the request for arbitration.[77] It constitutes both the authorization given by the investor to its lawyer to launch the proceedings and the claimant's consent to submit the dispute to arbitration.

The validity of the consent embodied in the power of attorney is a matter of jurisdiction. The law applicable to the determination of the tribunal's jurisdiction under Article 25 has been the subject of great debates; however, the predominant view in the field is that principles of international law should apply.[78] Therefore, the validity of the consent expressed in the power of attorney is subject to the general principle of international law and should be assessed with regard to the ICSID general framework.[79]

2. The Scheme of Representation

In the *Abaclat* case, *l'Associazione per la Tutela degli Investitori in Titoli Argentini* ("TFA") was created to "represent the interests of the Italian bondholders in pursuing a negotiated settlement with Argentina."[80] When the initiation of ICSID arbitration

[74] SCHREUER, *supra* note 50, at 218.
[75] ICSID Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Apr. 10, 2006) [hereinafter "ICSID Institution Rules"].
[76] *Id.* at Rule 1(1).
[77] *Ambiente*, ¶ 230.
[78] *Id.* ¶ 236; *Abaclat*, ¶ 447.
[79] *Abaclat*, ¶ 447.
[80] *Id.* ¶ 65.

against Argentina was considered as a new mandate, the "TFA Mandate Package" was designated. The Mandate Package contained, among other things, the TFA Instruction Letter, a Power of Attorney, and the TFA Mandate. The TFA Instruction Letter explained the object and modalities of the ICSID arbitration along with the instructions for the bondholders on how to participate.

The Power of Attorney contained a declaration of irrevocable consent to submit their claims to ICSID arbitration and to accept Argentina's offer to arbitrate contained in Article 8 of the BIT.[81] A Delegation of Authority and Power of Attorney conferred to the law firm White & Case the power to initiate and conduct ICSID arbitration on the claimants' behalf.[82] The TFA Mandate was granted by the signatories to TFA so that it could act as coordinator of the ICSID arbitration.[83]

In the *Ambiente* and *Alemanni* cases, *North Atlantic Société d'Administration* ("NASAM"), a company based in Monaco, set up an original third-party funding scheme under which it decided to "co-ordinate, organize and fund" aggrieved bondholders' legal action against Argentina.[84] The "NASAM Mandate Package" was signed between the claimants and NASAM. It contained a Special Power of Attorney and NASAM Mandate establishing a principal-agent relationship.

3. The Power of Attorney: A Clear and Unambiguous Expression of Irrevocable Consent

In *Abaclat*, the tribunal held that the Power of Attorney was a clear and unambiguous expression of irrevocable consent by the claimants to launch ICSID arbitration against Argentina and to entrust White & Case with its conduct. It concluded that the Power of Attorney constituted a written consent in the sense of Article 25(1) of the ICSID Convention.[85]

In *Ambiente* and *Alemanni*, the claimants were represented by Mr. Parodi, Mr. Radicati, and Mr. Barra. Only Mr. Parodi was designated in the "Special Power of Attorney." Mr. Parodi designated as co-counsel Mr. Radicati and Mr. Barra, according

[81] *Id.* ¶ 452.
[82] *Id.*
[83] *Id.* ¶ 85.
[84] *Alemanni*, ¶ 79.
[85] *Abaclat*, ¶ 453.

to the powers granted to him in the Special Power of Attorney. The circumstances of this delegation, in the *Alemanni* factual pattern, gave rise to complications.[86]

In *Ambiente*, the tribunal developed a flexible approach toward the formal requirements applying to the Special Power of Attorney based on two premises. The first was that Article 36 of the ICSID Convention has a double function, both launching the proceedings and embodying the claimants' written consent. Second, Article 1(1) of the ICSID Institution Rules only requires that the representative who signs the request of arbitration be "duly authorized." The tribunal deduced that no formal requirements applied to the Power of Attorney.[87] The majority, furthering the *Abaclat* finding, made no reference to the writing requirement of the Power of Attorney, avoiding numerous criticisms regarding its formal validity.

However, it is difficult to understand why the link between Article 25 and Article 36 is established both substantively (through consent) and formally (through the written requirement), whereas the link between Article 36 and Article 1(1) of the Institution Rules departs from the formal requirement of a written vehicle to embody the claimants' consent. This *Ambiente* finding seems too far-fetched, threatening the written requirement of Article 25, the sole formal condition ensuring the integrity of the claimants' consent.

4. The Validity of the Consent

To address the validity of the claimants' consent, it is important to keep in mind the main inquiry of the *Abaclat* tribunal separating jurisdiction from admissibility issues. Once it has been established that the Power of Attorney constituted a clear and unambiguous consent by the claimants, the only question related to the jurisdictional requirement of consent that remains is whether or not this consent was flawed.

The tribunal in *Abaclat* considered that the TFA Mandate Package contained enough information for the claimants to make an informed consent as to whether or not they wished to submit their dispute to ICSID arbitration.[88] The tribunal found

[86] *Alemanni*, ¶ 37.
[87] *Ambiente*, ¶ 242.
[88] *Abaclat*, ¶ 461.

that even though some of the claimants might not have had "a full picture of what they were doing" when signing the TFA Mandate Package, they were able to acquire it afterward.[89] It then emphasized that the claimants were in a position where they *could have* contemplated the scope of their commitment. In the course of the proceedings, the claimants did not invoke a lack of consent. Therefore, it was considered irrelevant whether or not they *effectively* contemplated the scope of their commitment.[90]

The representation scheme was not considered as having flawed the claimants' consent.[91] Initiation of the proceedings by White & Case in accordance with the TFA Mandate Package did not impair the validity of the claimants' consent.[92]

The tribunal in *Alemanni* mentioned its "discomfort" regarding the Special Power of Attorney and the sub-delegation from Mr. Parodi to Mr. Radicati and Mr. Barra.[93] The sub-delegation occurred without informing the claimants, and the letter of authority in favor of Mr. Radicati and Mr. Barra was submitted at the post-hearing stage.[94] However, the tribunal, while recognizing that there has been a "cavalier disregard of niceties that falls below the standards normally expected in ICSID arbitration,"[95] considered that it had not impaired the claimants' consent and that the absence of such consent would have manifested itself in one way or another.

Regarding the representation scheme common to *Alemanni* and *Ambiente*, the tribunal in the latter case held that NASAM's mandate did not undermine the tribunal's proper exercise of its jurisdiction.[96]

Eventually, the tribunals found that the claimants had expressed a clear and unambiguous consent through the mandates of attorney. The claimants' consent had been flawed neither by the original scheme of representation nor by the circumstances under which the powers of attorney were signed.

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[89] *Id.* ¶ 463.
[90] *Id.*
[91] *Id.* ¶ 464.
[92] *Id.* ¶ 465.
[93] *Alemanni*, ¶ 279.
[94] *Id.* ¶ 278.
[95] *Id.* ¶ 279.
[96] *Ambiente*, ¶ 278.

C. *Toward a Double Standard to Assess the Parties' Consent*

A double standard to assess the parties' consent seems to have emerged that indicates the development of an interpretative presumption in favor of investors' protection.

1. Starting Point: The Development of a Double Standard of Consent

A double standard of consent arises from the tribunals' findings. On the one hand, a very stringent standard applies to the respondent State's consent. If the host State wishes to avoid mass claim proceedings, it has to *explicitly* state it. The respondent State can exclude mass proceedings from the scope of its general consent by notification to the Centre following the procedure set up by Article 25(4) of the ICSID Convention. The respondent State can also exclude mass proceedings from the scope of its special consent by a cautious drafting of the dispute resolution mechanism contained in the BIT.

On the other hand, a presumption in favor of the claimants' consent seems to emerge. The tribunals in *Abaclat*, *Alemanni*, and *Ambiente* obtained the claimants' consent and overcame strong objections against its existence and validity. To do so, the majorities relied on the argument that a "lack of consent would have manifested itself." The fact that the tribunals used such a questionable argument to characterize a crucial jurisdictional requirement is puzzling.

Moreover, the assessment of validity of the claimants' consent is done according to the relevant principles of international law. Reliance upon international law to appraise the claimants' consent allowed the tribunals to depart from the domestic rules that might otherwise have come into play. Use of international law *principles* offers flexibility, whereas domestic *rules* may have submitted consent to more burdensome criteria. Therefore, the use of international law principles favors characterization of the claimants' consent. The arbitral tribunals used all available means to retain the existence and validity of the claimants' consent to the extent that a mere presumption *in favorem* seems to have emerged.

2. Furthering the Analysis: An Interpretative Presumption in Favor of the Investors' Protection

Faced with ambiguity regarding the claimants' consent, the protection of

investors takes precedence. Keeping in mind that consent is the "cornerstone" of investor-State arbitration, it can be assumed that this is not an attempt to weaken this fundamental jurisdictional requirement but a willingness to retain a tribunal's jurisdiction over a large number of claims. By retaining the tribunals' jurisdiction over mass claims in the cases at issue, the arbitrators made a choice of profound regulatory importance driven by policy considerations. By doing so, the tribunals furthered the main purpose of the investor-State arbitration system, *i.e.*, offering an effective procedural means to protect substantive rights. The boilerplate asymmetric standard to assess consent that is developed in the Argentinean trilogy is a further building block and a weight-bearing pillar for the development of a system that protects investors.

The tribunals in these cases have established that they had jurisdiction over the claims brought before them. However, in order for the tribunals to hear the cases, they had to determine if the claims were admissible. It is then through the lens of admissibility that the "mass" aspect of the claims had to be examined. In so doing, the most interesting issue is the distinctive methodology developed to address the admissibility of the "mass" aspect of the claims.

VI. THE CALL FOR A SPECIFIC METHODOLOGY TO ADDRESS "MASS CLAIMS" ADMISSIBILITY

The *Abaclat* decision is noteworthy for the methodology developed in order to address the issue of mass claims' admissibility. From the observation that the conventional instruments are silent regarding the admissibility of mass claims, the tribunal used the opportunity to develop a methodology meant to address the specific issues incurred by the silence of the conventional instruments.

A. *Starting Point: The Silence of the Conventional Instruments*

In the *Abaclat* case, the tribunal found that the ICSID framework contains no reference to mass proceedings as a possible form of arbitration.[97] Therefore, the tribunal developed an analysis to determine the adequate means to address this silence of the conventional instruments.

[97] *Abaclat*, ¶ 517.

The *Ambiente* tribunal, on the contrary, did not consider that there was a need to enter the controversy regarding the scope of the ICSID tribunal's power to deal with the adaptations of the ICSID procedural setting.[98]

The *Alemanni* tribunal equally refused to address the procedural implications of the silence of the ICSID framework.[99] The tribunal considered that if a claim is brought before an ICSID tribunal and said tribunal finds that it has jurisdiction, the adjudicative body is under a duty to exercise its jurisdiction.

Although the *Alemanni* and *Ambiente* tribunals addressed neither the silence of the ICSID procedural framework regarding mass proceedings nor the means to address it, those questions cannot be eluded. Moreover, it is worth explaining from where the tribunals' power to adapt the existing proceedings derives.

B. *Interpretation of the Silence*

The core question when it comes to the admissibility of mass proceedings is the interpretation of the silence of the conventional instruments.[100] If this is a "qualified silence," it means that the omitted reference was intended, which indicates that the ICSID framework does not allow mass claims to proceed on the merits.[101] If it is a "gap," it means that the silence was unintended and that the tribunal has the power to fill said gap.[102]

To interpret the silence of the conventional framework, two tools of interpretation can be used.[103] The first one resorts to public international law. The second one uses an investor biased approach that also underlies the ICSID framework. The *Abaclat* tribunal in its search for the right solution used a combined approach.

1. The Public International Law Approach

Investor-State arbitration results from a bargaining process between two States. To give effect to the inter-State bargain, arbitral tribunals need to look at the intent

[98] *Ambiente*, ¶ 169.
[99] *Alemanni*, ¶ 270.
[100] *Abaclat*, ¶ 517.
[101] *Id.*
[102] *Id.*
[103] *See* VAN HARTEN, *supra* note 56, at 121.

of the sovereign parties. The States' intent is expressed through conventional instruments. According to this reasoning, silence in a conventional instrument should be interpreted consistently with said instrument.[104]

In order to determine whether the silence in the ICSID procedural framework ought to be considered a "qualified silence" or a "gap," deference should be given to the States' intent. The States' intent is expressed through the BIT, the ICSID Convention, and the Institution Rules. Eventually, the arbitral tribunals' analyses that address the silence of the ICSID framework should be conducted in light of the applicable BIT and the ICSID framework.

2. The Investor-Friendly Approach

The ICSID system aims to protect foreign investments. In order to further this goal, investor-State arbitration has developed as a regulatory dispute resolution mechanism. Through this mechanism, States' behavior toward investors is regulated, providing investors with substantive and procedural protections.

From an adjudicative point of view, it has given rise to interpretative presumptions in favor of the investor's protection. Those interpretative presumptions are achieved thanks to a "normative construction of investor protection."[105] The norm of investor protection has been erected as such within the ICSID framework. The norm of investor protection has then been elevated to a level that allows it to trump, or at least counterbalance, core concepts such as consent to arbitrate, or parties' procedural rights.

3. Seeking the Right Shade: The *Abaclat* Approach

The *Abaclat* tribunal reasoning should be read against the aforementioned theoretical background. The tribunal embraced both the public international law and the investor-friendly approaches.

The *Abaclat* tribunal's reasoning for the silence issue resorted to the public law approach. It found that it would be contrary to the purpose of the BIT and the spirit of the ICSID Convention to interpret the silence as a "qualified silence" categorically

[104] *Id.* at 132.
[105] *Id.* at 139.

prohibiting mass proceedings.[106] To that extent, it developed different arguments.

First, the tribunal stated that, at the time of conclusion of the ICSID Convention, mass proceedings did not exist,[107] and the drafters could not contemplate them. This argument relates to the international law approach since it deals with the drafters' intent during the States' bargaining process.

Second, the tribunal observed that investments came in different forms. Therefore, the ICSID procedural setting may not be fully adapted to resolve all kinds of disputes arising out of all kinds of investments. However, as long as the investments are protected, they should be granted procedural protection along with substantive protection. There is no standard type of investment; thus there is a need for flexibility in the proceedings. However, the call for flexibility shall not be detrimental to the general principle of due process, and a balance between procedural rights and the interests of each party should be sought. This argument, taking into account the variety of investments and the call for procedural guarantees, relates to the investor-friendly approach.

The *Abaclat* tribunal concluded that the silence of the ICSID Convention regarding the admissibility of mass claims should be interpreted as a "gap." Therefore, it fell within its power to fill it.[108]

C. *The Means to Address the Conventional Silence – The "Gap-filing" Methodology*

To address the silence of the conventional instruments, the *Abaclat* tribunal derives its powers from textual and systemic grounds. However, the discretion allocated by those grounds is not without limits.

1. The Tribunals' Powers: The Textual Ground

A tribunal's powers to adapt the ICSID procedural framework are derived from Article 44 of the ICSID Convention and Article 19 of the ICSID Rules of Procedure for Arbitration Proceedings ("Arbitration Rules"). Those two provisions work in tandem.

Article 44 of the ICSID Convention, dealing with the issue of silence regarding procedural questions, states:

[106] *Abaclat*, ¶ 519.
[107] *Id.*
[108] *Id.* ¶ 520.

> Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.

Article 19 of the ICSID Arbitration Rules, dealing with the issue of silence within the context of arbitration proceedings, reads as follows: "The tribunal shall make the orders required for the conduct of the proceedings."

Reading those two provisions together shows that, in the event of *lacunae*, it is for the arbitral tribunal to provide the necessary procedural adaptations. This technique is known as the "gap-filling" methodology.

2. The Tribunals' Powers: The Systemic Grounds

The self-contained nature of the ICSID system explains the development of the "gap-filling" methodology. First, *lacunae* on procedural matters ought to be resolved by the arbitrators without reference either to the domestic or the international framework. The willingness to untether procedural issues from the domestic and international scheme renders necessary the development of an alternative methodology to address them. This is why the "gap-filling" methodology has been developed. In order to appreciate the breadth of the tribunals' discretion on procedural matters, an analogy with the applicable law inquiry is relevant. Article 42(1) of the ICSID Convention provides:

> The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

The arbitral tribunals are not bound by either domestic rules nor by international procedural principles when they deal with procedural matters, thereby reflecting the deeply self-contained nature of the system. ICSID proceedings appear to be not only self-contained but also denationalized.[109]

[109] DOLZER & SCHREUER, *supra* note 11, at 257.

Second, Article 44 of the ICSID Convention and Article 19 of the Arbitration Rules express in broad and general terms the arbitrators' powers regarding procedural adaptations. They both show the wide scope of the adjudicative role the arbitral tribunals are entrusted with in the ICSID field.[110] Once again, the comparison with the applicable law inquiry is relevant; the procedural discretion the arbitrators are entrusted with is enhanced. It is telling that the arbitrators' procedural discretion appears as the strongest expression of their adjudicative mandate as compared to their discretion on applicable law inquiry. The self-contained nature of the system calls for such extended adjudicative powers on procedural matters. However, the discretion the arbitrators are granted does not come without limitations.

3. The Limits of the Tribunals' Discretion

Tribunals' discretion in dealing with procedural adaptations is circumscribed by inner and outer limits.

(i) The Inner Limits of the Tribunals' Discretion

In order to circumscribe the inner limits of the tribunal's discretion while implementing the "gap-filling" methodology, the *Abaclat* majority developed a threefold inquiry regarding the adequacy of the procedural adaptations. The adaptations should be limited *ad rem*. Moreover, an *in concreto* and *in abstracto* inquiry should lead to the conclusion of their adequacy.

a. An *Ad Rem* Limitation of the Adaptations

In the ICSID field, a revision of the Arbitration Rules falls within the exclusive competence of the Administrative Council.[111] An arbitral tribunal cannot modify the existing Arbitration Rules without the parties' consent.[112] It cannot adopt a full set of rules of procedure unless the parties (i) agreed that the Arbitration Rules do not apply and (ii) have not provided another set of rules.[113]

The *Abaclat* award states that a tribunal's power is limited to the filling of gaps left by the ICSID arena "in the specific proceedings at hand."[114] The tribunal explained

[110] *See* VAN HARTEN, *supra* note 56, at 122.
[111] ICSID Convention, art. 6(1)(c).
[112] *Abaclat*, ¶ 524.
[113] *Id.*
[114] *Id.* ¶ 523.

that its role is neither to complete nor to improve the ICSID framework in general but rather to design specific rules to deal with a specific problem arising in a given proceeding.[115] To that extent, the "gap filling" methodology is not an amendment of the existing rules but an adaptation of the rules. The "gap filing" methodology is meant to make a procedure workable within the ICSID framework.

b. An *In Concreto* Inquiry into the Adequacy of the Adaptations

The question remains as to the adequate means to address the procedural issues incurred by the mass aspect of the proceedings. Is the "gap filling" methodology, through an adaptation of the existing Arbitration Rules, adequate or is there a need for a general amendment of the existing Arbitration Rules?

In order to address this question, the *Abaclat* majority divided it into two sub-inquiries. First, it focused on the procedural needs induced by the mass proceedings. Second, it considered whether or not those needs could be adequately addressed through the powers the tribunal derived from Article 44 of the ICSID Convention and Rule 19 of the Arbitration Rules.[116]

The *Abaclat* tribunal found that the procedural needs were related to the conduct of the proceedings. Those procedural needs could be addressed through the powers the tribunal derived from the ICSID procedural field.[117]

c. An *In Abstracto* Inquiry into the Adequacy of the Adaptations

In determining whether the procedural adaptations were adequate, the *Abaclat* tribunal focused on the implications of the adaptations.[118] They were twofold: (i) it would have been impossible to treat each claimant as if it was a sole claimant, and thus some issues would have needed to be examined collectively, and (ii) the parties' procedural rights might have been affected by the adaptations.[119]

To address the inevitable constraints the adaptations would impose on the parties'

[115] *Id.*
[116] *Id.* ¶ 527.
[117] *Id.* ¶ 534.
[118] *Id.* ¶ 536.
[119] *Id.*

procedural rights, the tribunal used a "balance of interest" test. It considered that the complete denial of justice that would result from a rejection of the claims was a greater evil than the constraints imposed on the parties' procedural rights.[120] The tribunal therefore concluded that the *in abstracto* inquiry into the adequacy of the adaptations called for the exercise of its discretion to determine procedural matters.

(ii) The Outer Limit of the Tribunal's Discretion – Prohibition of Serious Departure from a Fundamental Rule of Procedure

The thorough analysis conducted by the *Abaclat* tribunal in taking note of the silence of the conventional instruments characterizes it, in order to ascertain its power and the appropriateness of their implementation, as being of core importance. Indeed, Article 52(1)(d) of the ICSID Convention sets as a ground for annulment of the award a "serious departure from a fundamental rule of procedure." The seriousness of the departure is ascertained against the material effect on the parties.[121] A rule will be considered fundamental if its violation affects the fairness of the proceedings.[122] Thus, Article 52(1)(d) of the ICSID Convention constitutes the outer limit of a tribunal's discretion in implementing the "gap-filling" methodology.

As previously explained, necessary adaptations of the procedural framework involve compromises regarding the procedural rights of the parties and due process guarantees. To avoid annulment of the award, the tribunal had to develop an in-depth analysis of the grounds and motives that allowed it to depart from fundamental rules of procedure.

VII. CONCLUSION

Mass claim proceedings have emerged in the investor-State arbitration system as an appropriate means to address widespread legal harm, and the *Abaclat*, *Ambiente*, and *Alemanni* cases create a new procedural device for "mass proceedings." That mass proceedings procedure is the heir of multiparty arbitrations and shares common features with mass processes in the public international law field.

In establishing this mass proceedings framework, the *Abaclat* tribunal drew a clear

[120] *Id.* ¶ 537.
[121] DOLZER & SCHREUER, *supra* note 11, at 283.
[122] *Id.* at 257.

line between jurisdiction and admissibility, thus allowing a rigorous analysis of the procedural issues involved. From a jurisdictional point of view, the tribunal developed asymmetric standards for assessing the parties' consent: a low standard for the claimants and a high standard for the respondent. From an admissibility point a view, the tribunal used the "gap-filling" methodology to address the lack of procedural means to handle mass claims in the ICSID arena.

Moreover, the arbitral tribunals did not engage in "legal genetic engineering," which could ultimately "produce a monster," contrary to the fears set out by the dissenting arbitrator in *Abaclat*.[123] The tribunals rather developed a new procedural device that benefited the whole system because mass proceedings provide effective procedural protection to a wider range of investors.

Fundamentally, the Argentinean trilogy of cases illustrates the two theoretical views of international investment law.[124] The majorities' opinions reflect the liberal internationalist approach, which stands for the proposition that investment law serves private interests in order to enhance the freedom of capital movements. The dissenting opinion in *Abaclat* reflects the sovereigntist approach, which stands for the proposition that investment law should limit States' exposure to mass claims. Looking forward, the resolution of mass claims in international investment treaty arbitration likely lies somewhere between these two approaches.

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Prior to joining Meyer Fabre Avocats, Marine trained in the arbitration groups of U.S. and British law firms where her practice focused on international commercial and investment arbitration, and she has been involved in ICC, ICSID, and CCJA (OHADA) arbitration proceedings.

[123] *Abaclat*, Dissenting Opinion, ¶ 255.
[124] Stacie I. Strong, *Class, Mass Procedures As A Form of "Regulatory Arbitration" - Abaclat v. Argentine Republic and the International Investment Regime*, 38 J. CORP. L. 259, 302 (2013).

BOOK REVIEW
FAIR AND EQUITABLE TREATMENT: ITS INTERACTION WITH THE MINIMUM STANDARD AND ITS CUSTOMARY STATUS
BY PATRICK DUMBERRY

by Mallory Silberman*

In his latest book, FAIR AND EQUITABLE TREATMENT,[1] prolific commentator Patrick Dumberry offers a fresh perspective on an oft-debated issue—namely, the contents of the "fair and equitable treatment" standard ("FET standard").

The book does not attempt to tackle this issue directly (as Dumberry himself makes clear in his introduction).[2] Instead, as Dumberry states, his aim was to try to shed light on a recurring legal question that could bear upon the issue.

As Dumberry explains, various parties and scholars have argued that the FET standard either is (i) equivalent to an existing customary international law concept (*viz.*, the "minimum standard of treatment"), or (ii) a standalone rule of customary international law. In his book, Dumberry puts these arguments to the test, examining them against the rubric of modern history.

The book begins by recounting the history of the minimum standard of treatment ("MST")—from its "emergence … in the early 20th century," to its recognition as a "rule of custom,"[3] and, eventually, to its near demise in the 1960s and 1970s, when "a growing number of 'Newly Independent States' who were emerging from colonialism" began to challenge "the legitimacy of existing customary international law."[4] According to Dumberry, these challenges are what prompted States to "beg[i]n including the term FET in their BITs."[5]

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* The views expressed in this article are the author's own, and should not be attributed to Arnold & Porter Kaye Scholer LLP or to any of its clients.

[1] PATRICK DUMBERRY, FAIR AND EQUITABLE TREATMENT: ITS INTERACTION WITH THE MINIMUM STANDARD AND ITS CUSTOMARY STATUS 3 (Ian A. Laird et al. eds., 2018).

[2] *Id.*

[3] *Id.*

[4] *Id.* at 15 (original emphasis omitted).

[5] *Id.* at 23.

After setting out this history, Dumberry then considers its implications on the hotly-debated question of whether "FET should be considered as an independent treaty standard, having an autonomous meaning from the MST."[6] In Chapter 1, Dumberry argues that, because FET emerged as an alternative to the MST, it should be treated as such "when the [FET] clause is unqualified and contains no reference whatsoever to international law."[7] Following this discussion, Dumberry turns in Chapter 2 to an analysis of a "related (but distinct) issue: whether or not the FET standard should be considered in and of itself as a rule of customary international law."[8] In this chapter—which is also the last chapter—Dumberry takes the position "that the FET standard has *not* become a customary rule."[9]

The book is relatively short, but is an interesting read—and a thoughtful contribution to the scholarship in this area.

MALLORY SILBERMAN, a partner at Arnold & Porter, has served as counsel in more than 30 investment treaty arbitrations, including more than 20 at the International Centre for Settlement of Investment Disputes (ICSID). Among her past and present clients are the governments of Chile, Costa Rica, the Czech Republic, the Dominican Republic, Guatemala, Hungary, the Kyrgyz Republic, Panama, the Philippines, the Slovak Republic, and South Korea. Ms. Silberman also has represented investors, including Daimler Financial Services, EDF, and Mercer International. She has been recognized for this work by Who's Who Legal ("Future Leader" in International Arbitration, 2017–19), Latinvex (top 100 female attorneys working on Latin American matters, 2017–18), and SuperLawyers ("Rising Star" in International Law, 2015–2018). In addition to her work as counsel, Ms. Silberman is an adjunct professor at the Georgetown University Law Center where she has taught a course since 2012 on substantive issues and oral advocacy in international arbitration.

[6] *Id.* at 28.
[7] *Id.*
[8] *Id.* at 48.
[9] *Id.* at 49 (emphasis in original).

BOOK REVIEW:
TRADE USAGES AND IMPLIED TERMS IN THE AGE OF ARBITRATION, EDITED BY FABIEN GÉLINAS

by Epaminontas E. Triantafilou & Marina Boterashvili

I. INTRODUCTION

Commercial disputes often arise out of ambiguous or uncertain contract terms. In such disputes, the parties invite the court or, in the case of commercial arbitration, the tribunal to construe the words of a contract. Where the contract is silent, the parties may request the court or tribunal to "fill in the gaps" by implying certain terms into a contract. This is often done by reference to trade usage, so that certain words and practices take on a specialized meaning specific to a particular trade or business field. It is fairly common for tribunals to take into account trade usage even in circumstances where the terms of a contract are not necessarily ambiguous.

While this exercise may be relatively straightforward on the domestic plane, it is less so in the field of international arbitration. On this complex and intriguing subject, TRADE USAGES AND IMPLIED TERMS IN THE AGE OF ARBITRATION[1] draws together a collection of papers which provide a concise overview of key legal systems' and legal instruments' approach to implied contractual content. Crucially, the chapters take into account judicial practice and offer practical analysis. Moreover, the book explores the extent to which trade usage is evolving into a transnational legal doctrine, and the conceptual parameters of its development.

II. THE BOOK

As highlighted by Gélinas in an insightful introductory chapter, the status of trade usage lies in a somewhat uncomfortable hierarchical position between law and contract, so that a transnational conception of trade usage has emerged from international arbitral practice. Accordingly, the primary theme of TRADE USAGES AND IMPLIED TERMS IN THE AGE OF ARBITRATION is to explore how trade usage fits into

1 TRADE USAGES AND IMPLIED TERMS IN THE AGE OF ARBITRATION (Fabien Gélinas ed., Oxford Univ. Press 2016).

domestic law and the now broadly accepted notions of transnational private law and *lex mercatoria*.

Part I does so by offering six national perspectives on trade usage and implied terms. Geoff R. Hall's chapter traces the development of custom and usage in English law as a tool for contextualizing the parties' agreement, with the ultimate aim of accurately discerning their intentions. In doing so, Hall takes the reader through key cases, illustrating the English courts' gradual movement from a primarily textualist approach towards greater emphasis on the relevant context in contractual interpretation. This journey starts with a helpful overview of the seminal judgments of the House of Lords in *Prenn v. Simmonds*[2] and *Reardon Smith Line Ltd. v. Yngvar Hansen-Tangen*.[3] Building on Lord Wilberforce's judgments in these cases, Hall draws out the significance of Lord Hoffmann's judgments in, *inter alia*, *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*[4] and its application in other common law systems, including Canada, New Zealand, Australia, and the United States. Hall's analysis of the law on implied terms is also a helpful summary of the law's development prior to *Marks & Spencer v. BNP Paribas*.[5] Hall draws his analysis together in the concluding parts of the chapter, where he assesses the role of custom and usage as perhaps the earliest form of contextualism in contractual interpretation in England.

Lydie Van Muylem's chapter looks at implied content of contracts from a civil law perspective and through the prism of the French and Belgian legal systems in particular. For those unfamiliar with the civil law tradition, Van Muylem provides an effective summary of the core principles underpinning both systems. Looking at the mechanisms through which usages are applied in contracts, Van Muylem also provides the reader with interesting insight into the development of principles of good faith and equity as sources of implied content.

[2] Prenn v. Simmonds, [1971] 1 WLR 1381 (HL).
[3] Reardon Smith Line Ltd. v. Yngvar Hansen-Tangen, [1976] 1 WLR 989 (HL).
[4] Inv'rs Comp. Scheme Ltd. v. West Bromwich Bld. Society, 1 WLR 896 (HL).
[5] Marks & Spencer plc v. BNP Paribas Secs. Servs. Tr. Co. (Jersey) Ltd., [2015] UKSC 72.

Marie-Claude Rigaud explores the use of what she terms as "white space" (also known as blank space or negative space) in a contractual context and the legislative and judicial response to such space. The Quebec Civil Code mandate to incorporate by interpretation certain usages established by course of dealing or similar grounds is considered, along with the approach of the courts to tempering the potential impact of usages on subjective intent. The chapter offers an interesting examination of how to balance the importation of usages – objectively determined – with subjective contractual intent.

An Italian perspective follows from Luca G. Radicati di Brozolo and Giacomo Marchisio. Their co-authored chapter, much like the other contributions to the first part of TRADE USAGES AND IMPLIED TERMS, offers the reader a brief, yet informative, overview of the development of contract theory in Italian law. Radicati and Marchisio then engage in a general analysis of the three types of usage in Italian law, which the authors emphasize to be distinct and diverse. The authors proficiently navigate the reader through the relevant Italian legislation, drawing on numerous examples from local jurisprudence to give the provisions of the Civil Code the necessary color and practical context. The second part of the chapter, on the other hand, puts usages in the global context, rightly recognizing that this is where the challenge lies irrespective of jurisdiction. The authors' conclusions are of particular value to practitioners with exposure to arbitrations or litigation with an Italian element.

In *Not Merely Facts*, Helge Dedek provides the fifth and penultimate national perspective, from Germany. In an intellectually engaging chapter, Dedek explores the ambiguity of so called "normative" usages by reference to leading cases in the local courts. His analysis seeks to reconcile the ideologies of free will and party autonomy, which are meant to be reflected in the terms of a contract, with the judiciary's ability to create a "normative will" of the parties by implying content which the parties did not expressly agree to.

The focus of the final chapter of Part I is the Uniform Commercial Code (UCC), a uniform set of commercial transaction rules adopted as law in many U.S. states, as an instrument for establishing trade usages. This study is wide-ranging. It considers

the origins of the UCC's incorporation strategy, *i.e.*, the consideration of trade usage, course of performance, and dealing as a tool of contractual interpretation, together with its implementation in practice. Christopher R. Drahozal also considers the influence of the UCC's incorporation strategy on the common law, which continues to apply to those contracts where the UCC does not apply. In order to offer the reader the most informed view, Drahozal also draws together the most prominent criticisms of the UCC.

For practitioners, each of these chapters offers a valuable glimpse into legal systems often highly relevant in international arbitration. Contrary to the domestic focus of Part I, however, the second part of TRADE USAGES AND IMPLIED TERMS looks at the same concepts in the transnational context. Various core international legal instruments are considered in a carefully crafted and considered collection of essays.

The role of trade usages in the 1980 Vienna Convention on Contracts for the International Sale of Goods (CISG) is investigated in the chapter by Geneviève Saumier. Recognizing the role of the CISG as a central instrument in the development of trade usage in international trade and transnational law, Saumier strikes the balance between identifying the main principles and provisions of the CISG (also providing the reader with an overview of the legislative history of such provisions) and noting the areas of debate still surrounding trade usages in relation to the CISG in relevant commentary and case law.

Similarly, Lauro Gama Jr.'s chapter on the UNIDROIT Principles of International Commercial Contracts offers the reader a concise overview of trade usages and, to a certain extent, implied obligations in this context. Gama summarizes the basic principles underlying the UNIDROIT Principles and international trade more generally. Perhaps most helpfully, however, Gama offers practitioners and advanced students a well-crafted analysis of the development and integration of trade usages in transnational law and their interpretive influence against the backdrop of specific articles of the UNIDROIT Principles and other international instruments. While acknowledging the significant contribution of the UNIDROIT Principles to the

development of trade usages, the author recognizes the fragile legal status of trade usages, as they remain, in his words, "an institution in the making."

Chapter 9 offers an overview of trade usages in the context of arbitration under the rules of the International Chamber of Commerce (ICC). The ICC Rules specifically instruct a tribunal to take into account "relevant trade usages" together with the provisions of the contract between the parties. The chapter is, accordingly, a practical and pragmatic analysis of ICC arbitral practice in this area and arbitral tribunals' interpretations of usages.

The volume suitably concludes with two final chapters which look towards the future. H. Patrick Glenn looks at the future role of trade usages from the perspective of the historical development of the informal norms of the law merchant, and its suitability and potential for a more frequent direct role in transnational commercial cases. Fabien Gélinas' final chapter then skillfully draws the contents of this book together. As an experienced arbitrator, he does so by identifying the question facing modern international practitioners in this context – namely how much weight to accord to trade usages irrespective of the parties' choice of law.

III. CONCLUSION

Overall, TRADE USAGES AND IMPLIED TERMS IN THE AGE OF ARBITRATION offers a useful summary of the application of trade usages in major legal systems, while not shying away from the complexity and difficult questions the employment of such usages invites in the transnational context. It will therefore undoubtedly prove helpful to both practitioners of transnational arbitration, as well as more academically minded lawyers.

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KEYNOTE REMARKS:
GLOBAL ENERGY MARKETS—U.S. FOREIGN POLICY PERSPECTIVES

by Richard Westerdale

Keynote address delivered at the 5th ITA – IEL – ICC Joint Conference held in Houston, Texas on January 18-19, 2018.

This keynote addressed the changing global energy landscape, the United States (U.S.) Administration's priorities in the sector, and the role of the U.S. Department of State and the Bureau of Energy Resources.

Thank you to the Center for American and International Law, as well as the International Chamber of Commerce, for hosting this event and allowing me to speak here today.

We are living in a time of dramatic change in the global energy sector. The picture of supply and demand that most of us envision has been shattered. Technology, entrepreneurship, good policy, and commodity prices have radically reduced U.S. oil import dependence and have changed the geography of energy. Energy sits at the nexus between national security, economic development, and environmental responsibility—as it always has. We now live in a global economy with interdependent energy markets. Energy shortages, price volatilities, or market supply disruptions anywhere threaten economic growth everywhere. We all remain energy interdependent.

For these reasons, we are emerging from four decades—since the oil embargos of the 1970s—of energy scarcity. Today, we are entering a new era of energy abundance, and collectively it is in everyone's best interest to ensure that all nations are able to meet these same basic needs that are represented by the nexus of energy. This fundamental change increases geopolitical stability—or national security—and fosters economic growth globally. It is a

good news story for the U.S.[1]

I know many of you are interested in hearing about what this Administration's energy policies mean for U.S. industry and our relationships around the world. However, first, I want to emphasize one core principle of this Administration. President Trump has been unapologetic, as highlighted in the recently released National Security Strategy, "that [his] Administration would put the safety, interests, and well-being of our citizens first"[2] as the world's leading energy producer, consumer, and innovator.

We have the opportunity to think creatively about continuing to work together with our friends and allies to achieve our collective energy and broader economic policy goals. What are our collective energy and broader economic policy goals? Quite simply, through diplomacy, we will seek to: (1) remove barriers to energy development and trade; (2) promote U.S. energy exports, including resources, technologies, and services; and (3) ensure economic and energy security for the U.S. and our allies and partners. These goals are focused on boosting domestic energy production, creating jobs here at home, and streamlining or eliminating certain regulations to restrictions to trade and development.

At the Bureau of Energy Resources at the State Department, we address the pivotal intersection of energy and foreign policy. We seek to ensure that the U.S. leadership on global energy issues remains. We respond to energy challenges from around the world that affect American prosperity and U.S. national security. U.S. national security is threatened when our allies lack reliable access to diversified, affordable, and reliable energy; when foreign energy markets exclude U.S. companies; when poor governance prevents

[1] Donald J. Trump, National Security Strategy of the United States of America 1, (Dec. 2017), https://www.whitehouse.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf.
[2] *Id.* at 22-23.

market-based energy solutions; or when competition for energy leads to conflict. Finally, U.S. national security is threatened when terrorists or rogue regimens exploit energy resources to fund violence or destabilizing activities.

Before I delve any further, let me provide some background on today's global energy landscape. First, the oil and gas landscape has evolved tremendously over the past decade. In the last ten years, the U.S. has nearly doubled its oil production. Natural gas production has increased by more than 40%. The U.S. has transformed from being a natural gas importer to a natural gas exporter, including liquefied natural gas ("LNG").

The Energy Information Administration ("EIA") projects that in 2018 the U.S. will have historic level of oil production and exports—an average of 10.7 million barrels per day of oil produced in 2018.[3] That is the highest annual average for production of oil in U.S. history.

Also, according to the recently released International Energy Agency's 2017 World Energy Outlook, the resilience of unconventional resources in the U.S. cements our position as the biggest oil and gas producer in the world, even at today's lower prices.[4] Today, we are producing 775 billion cubic feet of natural gas. According to the EIA, U.S. natural gas production is on its way to nearly one trillion by 2025. These trends culminated in a historic first when the U.S. had its first export cargo of LNG from the Gulf Coast in February 2016. Since that time, more than 225 cargos have left those shores to a truly global footprint of 25 different countries around the world. The U.S. is having an impact internationally, and there is more LNG on the horizon.

The Department of Energy has authorized the export of 21.33 billion cubic feet of natural gas per day to non-free trade agreement countries from

[3] *See* U.S. Energy Information Administration, *EIA Expects Total U.S. Fossil Fuel Production to Reach Record Levels in 2018 and 2019* (Jan. 18, 2018), https://www.eia.gov/todayinenergy/detail.php?id=34572.
[4] *See* International Energy Agency, WORLD ENERGY OUTLOOK 2017 (Nov. 2017).

facilities that are either under construction or approved today. That translates into approximately 220 billion cubic meters of LNG. To put that into perspective, that quantity equates to about one-fourth of the U.S. annual consumption or half of the EU's total natural gas consumption in 2016. Looking at it yet another way, Russia in 2016 exported approximately 160 billion cubic meters to the EU. U.S. production, at 220 billion cubic meters, is pretty substantive. By 2020, the U.S. will be approaching over 100 billion cubic meters a year in LNG exports. It is amazing to think that some 10 years ago or less, we were still building import terminals.

The U.S. shale revolution has had a truly global impact. Thankfully, as natural gas markets become increasingly competitive and efficient, the world wins. Well-functioning gas markets reinforce global energy security, foster environmental stewardship, and advance U.S. economic and commercial interests abroad. In short, what is happening domestically is making a difference and having an incredible impact on foreign affairs.

There are also changes in the global coal markets. Given the 1.3 billion people in the world today without access to consistent forms of energy, coal will remain an integral part of global energy mix, especially in developing countries, as we have seen in China and India. The expectation is, however, that coal will decline as a percentage of the global energy mix. In absolute terms, the amount of coal consumed globally will actually increase through the next decade or two.

The U.S. sits on more than one-fifth (22%) of the world's coal endowment, and yet we produce only nine percent and export less than one percent of the coal consumed globally, according to the International Energy Agency's 2017 Coal Report.[5] This presents a real opportunity for the U.S., and the challenge

[5] *See* International Energy Agency, MARKET Report SERIES: COAL 2017, ANALYSIS AND FORECAST TO 2022 (Dec. 2017).

is how best to position U.S. resources to compete in this global market and ensure that there is a level playing field for U.S. companies. The ability of the U.S. and our resources to compete globally is in part driven by the logistics in finding cost effective ways to get our products to market. Further, our research and development are second to none when it comes to coal technology. Such technologies will allow coal to remain competitive within the changing regulatory environment. One example of that is the Petra Nova Project that is right here in Houston. This is a 240-megawatt coal fire power generation plant and the world's largest post-combustion carbon catcher project, actually capturing more than 90% of the CO_2 from that power plant. That is 5,000 tons of carbon a day and over 1 million tons a year. U.S. ingenuity has done that.

Let me get back to the Administration's foreign policy and priorities. When it comes to energy, the Trump Administration's foreign policy focuses on three areas. First, opening markets and removing trade barriers. Second, promoting exports of energy resources, technologies, and services. Third, and importantly, ensuring the energy security of the U.S. and our allies and partners. The Administration is committed to our national security. Our State Department has backed global projects that encourage diversification of fuel types, technology, supply sources, including counties of origin, and delivery routes. We continue to invest in both our diplomatic capital and our technical assistance resources in ensuring that countries achieve their own goals for energy security.

The U.S. is a staunch supporter of European energy security, which is critical in ensuring Europe's role as a forceful U.S. partner in meeting the global challenges that we face today, including Russia. This includes the issues that are faced by Ukraine, which is a strong example of where natural resources, in this case natural gas, is key to that country's national security.

In the Eastern Mediterranean, the successful exploration and export of natural gas resources will increase regional cooperation and energy security. The Middle East has been a hot spot and a challenge for us and remains that way. However, those natural resources can serve in the Eastern Mediterranean as a catalyst for increased stability in a very strategically vital part of the world.

North Korea has emerged as perhaps one of the starkest security challenges for the U.S. Here too energy plays a role. As a result of our engagement with China, we achieved, in August of last year, a U.N. prohibition on all North Korean coal exports,[6] removing over $1 billion of annual revenue from the regime's coffers. Most recently, the U.N. Security Council unanimously voted to impose further energy sanctions on oil and refined products to expand pressure on North Korea to return to the negotiations which are aimed at achieving complete, verifiable, and irreversible denuclearization of that state.[7]

Other parts of Asia—from Singapore to Tokyo—see opportunities for increased collaboration to enhance regional energy security though a growing supply of U.S. LNG. Our partners in the Asia Pacific view U.S. LNG exports to the region as a tool for diversifying their energy resources and ensuring access to reliable sources of supply as they strive to create a more integrated global gas market.

In Nigeria, the U.S. supports the government's energy sector and anti-corruption agenda. These reforms in this sector increase government revenues, which are crucial for the fight against organizations that are key on terroristic activities like Boko Haram and addressing the instability that we see

[6] S.C. Res. 2371, ¶8, U.N. Doc. S/Res/2371 (Aug. 5, 2017), https://www.un.org/sc/suborg/en/s/res/2371-%282017%29.
[7] S.C. Res. 2375, ¶ 13, U.N. Doc. S/Res/2375 (Sept. 11, 2017), https://www.un.org/sc/suborg/en/s/res/2375-%282017%29.

in the Niger Delta. They ensure that outside investors, including U.S. firms, are paid for their investments, something that is important to our interests.

Closer to home in Central America and the Caribbean, the U.S. is seeking to increase energy trade. Such development will benefit the U.S. as well as those countries of the region because it will enhance their energy security while creating new opportunities for globally competitive U.S. energy firms and exports as viable alternatives to the long-held influence of Venezuela and Petrocaribe.

Energy security remains at the forefront of the Department's foreign policy. However, looking closely at this, you will also see and notice an overlap between energy security and the Administration's emphasis on trade and exports. Investing in the U.S.'s energy, for example, not only helps our allies maintain their energy security, but it strengthens our economy and helps create jobs here at home. This represents a true win-win for all involved.

This is what I really want to hone in on. How do we unlock the U.S.'s full economic potential? The State Department advances the Administration's priorities through good old-fashioned advocacy, identifying new markets and some of our broader technical assistance. Technical support to countries with the capacity and the will to pursue energy sector reforms can spur private investment and U.S. energy technology exports. That is why we assist corporate government reforms in Ukraine and their state-owned enterprises to reduce the reliance on Russian gas imports, promote privatization of efficient state-owned entities, and accelerate reforms to combat corruption, as well as assist Ukraine in meeting EU standards and commitments.

As another example, in the Caribbean the U.S. is working to integrate resource planning efforts and regulatory reforms by encouraging governments and utilities to make transparent and economically viable decisions to mitigate risks for U.S. investors and deliver lower costs to

consumers in that region.

In Central America, the U.S. is working to enhance regional electricity integration, which will strengthen energy reliability and lower prices. More broadly, enhanced integration will provide opportunities for U.S. businesses while strengthening the regional economy. This, in turn, reduces some of those factors that drive illegal immigration and elicit trafficking to the U.S. and make doing business there so costly.

Bringing energy to Africa can unlock tremendous economic opportunity. 600 million people in Africa still lack access to electricity. The natural resource discoveries, including natural gas in Africa and around the world, present new opportunities for domestic gas fire power generation and will support economic growth. But these discoveries also come with a challenge of avoiding the "resource curse."

Advocating on behalf of U.S. energy companies and the hydrocarbon renewable and energy efficiency sector is another way we advance U.S. economic interest in trade. Historically, these efforts have translated in U.S. firms winning bids and securing billions of dollars in contracts around the world. In addition, the State Department works to resolve political tensions that affect U.S. firms and facilitate payment of arrears and resolve unfair tax liens by other countries.

One example of that was in Nigeria during a recent U.S. government led roundtable with the Nigerian Minister of State for Petroleum Resources—Dr. Emmanuel Ibe Kachikwu—and Senior Nigerian National Petroleum Corporation leadership. The Minister was able to announce the first payment of $400 million of the $5.1 billion in arrears that were owed to an international oil company.

At times there is the need to explain to our counterparts what is meant by our policies and regulations. Last year, the White House announced the initial

results of the 100-Day Action Plan of the U.S.-China Comprehensive Economic Dialogue. In particular, that welcomed China as well as any other of our trading partners to receive imports of LNG from the U.S. The dialogue, however, went further and included a candid reinforcement of the principles of open and efficient markets free of manipulation, which relates directly to China's influence in the global coal market.

Why is it that we do this? Because we have taken an all-of-the-above approach to energy. Because free and efficient markets combined with sensible regulations and good old-fashioned U.S. ingenuity—research and development—as well as strong capital markets make such things possible. This was true of the shale revolution and certainly can be true of hydrocarbons in general under this Administration. We want to work with our allies and partners to seek common ground and develop a way forward on these important energy issues. As Secretary Tillerson noted recently, "[e]nhancing European energy security by ensuring access to affordable, reliable, diverse and secure supplies of energy is fundamental to national security objectives."[8]

Let me conclude by stating something that is widely recognized but sometimes overlooked: the U.S. has a competitive edge on all segments of the energy sector. This advantage translates into jobs and investments into U.S. infrastructure.

You can expect this Administration to continue to highlight the competitiveness of U.S. energy exports and anticipate that we will do everything we can to promote the exceptional skill, expertise, and technology that reside here in the U.S. in order to unlock the U.S.'s full economic potential. Regarding our collective energy and broader economic policy goals, we will continue to seek to remove barriers to energy development and trade, to

[8] Secretary Rex Tillerson, Secretary of State, Remarks at the Wilson Center (Nov. 28, 2017), https://nl.usembassy.gov/secretary-tillerson-speaks-u-s-europe-strengthening-western-alliances/.

promote U.S. energy exports, again including resource, technology, and services, and ensure the economic and energy security of the U.S., its allies, and partners.

Thank you.

RICHARD WESTERDALE, is a former Senior Advisor, Bureau of Energy Resources, U.S. Department of State, Washington D.C. With over twenty-five years of experience in the energy arena, Rick previously worked as a Senior Advisor at the Department of State. He advised senior principals, including the Secretary, on the nexus of energy with U.S. national security and international energy policy priorities. Rick's focus was on international energy affairs and their effect on U.S. business interests including governance, access to energy, increasing access to conventional energy resources, and use of alternative and renewables technologies.

KEYNOTE REMARKS:
THE MATH: CAUTION + HABIT + BIAS

by Lucy F. Reed

Commentary by Gonzalo Flores

Keynote address delivered at the 15th Annual ITA-ASIL Conference held in Washington, D.C., on April 4, 2018.

This keynote addressed the math of diversity. The math is not hard: the numbers readily prove that international arbitration is not diverse. (Inclusivity is another issue.) Harder is to quantify the impact (if any) on arbitral justice. Harder still is to identify, confront and accept our role in the causes, which is the first step in finding workable solutions. Long experience suggests that it is caution, habit and, yes, bias that underlie our nondiverse practice.

Lucy F. Reed: Thank you, and welcome to all. I see so many good friends here, who are absent from my life so far away in Singapore. And of course, I share the sadness in not seeing David Caron here today. David is a friend of over thirty years. We were both Presidents of ASIL and Chair of ITA and had many opportunities together to scheme about these organizations and many other things.

I hope that you all are here not because you think I have all the answers to diversity issues and challenges in international arbitration. I certainly do not. I am better equipped to pose the questions than the answers. My personal preference is to take action to further diversity in international arbitration by teaching associates and students, by sponsoring, by networking, by appointing women and minorities to tribunals, and also by stepping back and making room in the front of the stage for the next generations. As such, I do not do that much speaking anymore and I frankly feel uncomfortable to be viewed as part of the story of successful women in arbitration. I would rather make things happen.

Nor have I written much directly about diversity. Exhibit A of the small number of highly-visible women in international arbitration—and this makes me laugh—is the fact that I am often mistaken for Lucy Greenwood, who is here today. Recently, I was at a conference where a man came up to me and said:

> *"I really like your recent article."*
> *I said: "Oh really, which one?"*
> *He said: "You know, the one about diversity."*
> *I said: "I really don't think I have written about that recently."*
> *He said: "Oh yes, you have. I am sure you have."*
> *I said: "**Really**, I am not Lucy Greenwood."*
> *And he said: "No, I'm sure you are."*

There are not that many "Lucy's." I am the tall one for anyone who wants to know.

Humor aside, I think it is important to keep the hard facts and challenges front and center.

The first question is why is diversity important? I think we all know the answer. We practice in a diverse global world with diverse disputes and therefore the people who resolve those disputes should be diverse and representative.

The second question is, whether there is diversity now among arbitrators and lead counsel? The answer is no, not so much, and not as much by far as there should be. I think when we talk about this, we have to keep in mind that arbitration tribunals are only three- or one-person strong. Women are not a minority, but we cannot aspire to 1.5 women per tribunal. We have to be looking at the broader pool of candidates to serve as arbitrators and lead counsel. That is what I call the "pool of experience."

Recently, I saw the headline about the first known three-woman tribunal. I am not sure what I think about that, because it may raise questions about whether that is diversity—to have three women on a tribunal? Does that mean

it is okay to have three men on a tribunal now? Of course the answer is no. It depends on the overall picture. But a three-woman tribunal does ring like a "*Man Bites Dog*" kind of headline. I remember when Chief Justice Beverly McLachlin from Canada was speaking about diversity and the judiciary at the ASIL Annual Meeting a few years ago. She said: "Won't it be nice when we get to the point where there aren't headlines about appointments of women or an all-woman tribunal or more than 50%?" And the answer is it will be, but we have a long way to go for that.

As I was thinking about what I could say about diversity writ large, I put my thoughts into the (partial) equation that is the title of my talk: "Caution + Habit + Bias."

This equation equals what? Caution + Habit + Bias equals, or causes, low levels of diversity in international arbitration. This is my personal view after some 30 years in this practice. I wonder if we cannot change this equation.

I start with **caution** because states and private parties will continue to be cautious and conservative about appointing arbitrators in cases of any magnitude. Why is that? Because when we are talking about arbitration, we are talking about awards that are non-appealable and enforceable relatively easy around the world. It is like sudden death (except it is not so sudden or fast anymore). In any case, these are not disputes that any reasonable party is going to entrust with anyone but the most experienced arbitrators.

Who is in that group is another question. This requires a brief reprise of the history of international commercial arbitration. I have been struck that some of the young practitioners are not aware of this history.

The key point is that no one started out to discriminate. If we go back to the '80s and '90s, arbitration was not a popular field of practice. With some exaggeration, it was not even a recognized field of practice, except for some Swiss professors. For example, when there were major Gulf oil disputes and

Alan Redfern and Martin Hunter started practicing international commercial arbitration at Freshfields in the 1960s and 1970s, there was no international arbitration group. Actually, there was not even a litigation group at that time. Arbitration was seen as risky and perceived as soft. Alan and Martin, as some of you know, recruited Jan Paulsson in Paris, as another new specialist in arbitration. And there was born one of the first, if not the first, international arbitration groups within major firms – without any certainty of success. Other excellent practices have followed, mostly in Europe, New York and the US "oil patch."

When international arbitration accelerated later, I would say in the '90s, in the wake of the Iran–U.S. Claims Tribunal and with increased foreign investment and bilateral investment treaties, there was a small cohort of experienced practitioners. As is generationally true of law firms and faculties at the time, it was predominantly men from western European commercial capitals. The parties new to this field—understandably—were cautious in appointing arbitrators from that cohort. They are still doing so, when it is no longer warranted.

The good news is that there is growing diversity in the number of experienced arbitrators in the growing pool of experience. Yes, the growth is slow. Given the high stakes in international arbitration, caution in appointments from the pool of experience continues.

Caution has to stay a factor in my equation. We cannot change it.

What *can* we change? This brings me to my second factor – habit. We know who we know. And so, when we look for arbitrators or lead counsel, we list people we know, rattling off our favorites. I am as guilty as anyone. The Equal Representation in Arbitration Pledge—which was launched by an ambitious and energetic group of women, including my former Freshfields partner Sylvia Noury—is important. I purposely took a backseat in the

development of this, so the younger women have more space. I did go to some of the dinners at which the Pledge idea was floated for discussion. I remember one in Hong Kong where the head of a leading international arbitration group—a man—described how successfully the Pledge was working for his group. He called it the "five-minute rule," by which he meant if the team took just an extra five minutes in listing names, they could and did think of names of experienced women, younger practitioners and non-Europeans. I follow this rule. How hard can it be? It is not rocket science to think more pro-actively about our appointments and recommendations.

The names that come up in that extra five (or more) minutes may not make it on your final list for a particular case, because they are not the right fit. Similarly, even though certain candidates make it on the list, they may not be selected for appointment. But, at least, those names get into play. They get into circulation. They get advertised and noticed. They start coming to mind—ideally by habit—and become part of a bigger pool.

As a (now former) Vice-President of the ICC Court of Arbitration, approving and observing arbitrator appointments, it is not a breach of confidence for me to tell you that there are many strong and diverse people sitting in arbitrations who are unknown to everyone in this room. I am also happy with the new ICC practice of posting on its website the names of all arbitrators in all cases, because this transparency allows more names to get into circulation. There is no breach of confidentiality as the tribunals are not matched to cases or parties. I would like to see other institutions do the same.

The institutions, we know, have long been better than parties in appointing diverse arbitrators. I have heard that the percentage of party appointments of women and minorities also is noticeably going up, since the Pledge was launched. To me, it is a positive sign that counsel are taking those extra five minutes.

I propose that we remove the factor of habit from my equation, because it hinders diversity unnecessarily.

Now, I come to my third and final factor, which is bias. We all have to acknowledge a very thin boundary between habit and bias, especially unconscious bias. Habit is knowing and selecting the people we know; bias slides into knowing and selecting people just like us. We all have biases. We should admit it.

The challenge is to recognize and confront and neutralize – or try to neutralize – our biases. This takes more than five minutes when we are building lists of potential arbitrators or lead counsel. This takes affirmative research. This takes going out and looking for new names and new people, which is why it is important to have more publicly available information on the pool of experience.

I am not sure whether habit or bias is more responsible for the discouraging statistics, but I think it is bias. I will tell you why. It is the mysterious 16% diversity ceiling. The surveys and the institutional data show fairly consistent percentages of women arbitrator appointments. In Lucy Greenwood's research to mark the one-year anniversary of the Pledge, she points out that some 17% of total appointments in 2016 were women.[1] Professor Susan Franck's survey from the 2014 ICCA Congress shows that 17.6% of total appointments were women.[2] The International Centre for Dispute Resolution's 2015 survey–16%.[3] The 2017 ICC Statistical Report–

[1] A Year of the Pledge: New Data on Women Arbitrators, Global Arbitration Review (May 17, 2017), available at https://globalarbitrationreview.com/article/1141813/a-year-of-the-pledge-new-data-on-women-arbitrators.

[2] SUSAN D. FRANCK, JAMES FREDA, KELLEN LAVIN, TOBIAS LEHMANN AND ANNE VAN AAKEN, THE DIVERSITY CHALLENGE: EXPLORING THE "INVISIBLE COLLEGE" OF INTERNATIONAL ARBITRATION (2015).

[3] White & Case, *Arbitral Institutions Response to Parties' Needs* (Apr. 10, 2017), https://www.whitecase.com/news/arbitral-institutions-respond-parties-needs.

16.7%.[4] The LCIA in 2015–16% (now up to more than 20%).[5] The Hong Kong International Arbitration Centre's survey of 2016 –11.5%, now 16.5%.[6] An outlier: in the Singapore International Arbitration Centre, women appointments are now up to 29.7%.[7]

Professor Debora Spar, who was one of the youngest female professors to be tenured at the Harvard Business School and who went on to become President of Barnard College, wrote a book in 2013 called *Wonder Women*,[8] In that book, Professor Spar documented what she called "the 16% delusion." She noticed that in every think tank report and at conference after conference the data repeated across different industries and sectors: 16.6% of Fortune 500 board members, women; 16% of partners in major law firms, women, 19% of surgeons, women. This despite the fact that as early as 1994 women accounted for 50% of graduating physicians, 46% of graduating lawyers, and 48% of Ph.Ds.[9]

Why is this? Why is this 16% ceiling there? One reason may be that 16% is deemed "good enough", regardless of the total size of the pool. Those who are graduating or hiring women may think that they have done well enough when they hit about 16%. At that percentage, they do not look for women for relevant vacancies unless and until a woman resigns or leaves her seat. In international arbitration, this probably translates to: "Look at me. Am I not great?" I appointed a woman to my last tribunal, and so I get a pass for a while."

[4] International Chamber of Commerce, ICC Court Releases Full Statistical Report for 2017 (July 31, 2018), https://iccwbo.org/media-wall/news-speeches/icc-court-releases-full-statistical-report-for-2017/
[5] London Court of International Arbitration, LCIA releases 2017 Casework Report (Apr. 10, 2018), http://www.lcia.org/News/lcia-releases-2017-casework-report.aspx
[6] Hong Kong International Arbitration Centre, 2017 Statistics, http://www.hkiac.org/about-us/statistics.
[7] SINGAPORE INTERNATIONAL ARBITRATION CENTRE ANNUAL REPORT (2017), available at http://www.siac.org.sg/images/stories/articles/annual_report/SIAC_Annual_Report_2017.pdf.
[8] DEBORA L. SPAR, WONDER WOMEN: SEX, POWER, AND THE QUEST FOR PERFECTION (2013).
[9] Id., at pp. 177-178.

This is far from looking for genuine diversity from the pool of experience, based on the requirements of each new case and the overall balance of tribunals as we appoint person after person or tribunal after tribunal. To me, the 16% ceiling looks to be influenced by bias.

Let me raise one more statistics point. This goes to unconscious bias, which many think is now gone. My statistics come from the Berwin Leighton Paisner 2016 diversity survey.[10] Among other things, they found that 84% of participants said there are too many male arbitrators, but only 12% said that gender is important or very important. That means that 72% actually are *not* concerned about gender, despite what they said. When asked whether tribunals should have gender balance, assuming equal qualifications, 50% said this is desirable, 41% said it makes no difference, and 6% said affirmatively that gender balance is *not* desirable. Really, what is that about in this day and age?

have some *positive* biases about arbitrator appointments. One is my bias for mid- to senior-level women arbitrators. The reason is not "just because." I have thought about this carefully: I cannot think of a woman arbitrator with whom I have sat or worked who is not always fully prepared, hands-on, careful and responsible.

My second positive bias is for youngish arbitrators. By youngish, I do not mean novice. I increasingly find myself unpopular in urging young practitioners not to lobby so hard for arbitrator appointments, at least in substantial cases. This is because, in my view, they are not ready for the responsibility of deciding cases. They lack the mileage necessary to build the judgment required. Indeed, I would say that their impatience to be arbitrators too early shows a lack of judgment. Further, a mistake early in one's career

[10] Berwin Leighton Paisner, *International Arbitration Survey: Diversity On Arbitral Tribunals - Are we Getting there*?, available at https://www.blplaw.com/media/download/FINAL-Arbitration_Survey_Report.pdf.

can lead to a poor reputation.

At this point, I want to delete bias from my equation.

I now turn to the topic of inclusion. The title of this Conference is "Diversity and Inclusion in International Arbitration." My keynote title in publicity said in parentheses that inclusion is another matter than diversity. I was taken to task on this by my friend Judge Gabrielle Kirk McDonald, who wrote: "Inclusion is not another issue, it is the real issue." Judge McDonald is right in the normal sense of the term. But I am not talking about inclusion or exclusion of people from arbitrator appointments because of race or gender or even experience.

What I mean is that, in international arbitration, we are extraordinarily inclusive in terms of training, educating, and welcoming newcomers. Look at the conferences, the trainings, the LLM programs in international arbitration. Look at the publications, the blogs, the Willem C. Vis and other moot competitions, the young arbitrator groups. The participants in all these activities – the conference audiences, the students, the young and old arbitration practitioners – are extraordinarily diverse. My corporate partners used to say to us: "What are you arbitration lawyers doing? Why do you give away your hard-earned experience and intellectual property to your competitors, with your books and your speaking about how to practice international arbitration?" My answer was because we want to include more people, with more diversity, in the international arbitration community.

This is why I am adding the factor of inclusion to my equation, with some caveats. On the one hand, I think this kind of inclusivity is good, because it helps build the pool of experience. On the other hand, I must voice my one note of concern about our inclusivity, which probably is an unpopular note. I increasingly wonder whether we are over-inclusive, given that this type of inclusion does not lead to actual work for a broader group. International

arbitration is a small field. I do not agree with the conventional wisdom that it is growing. We enjoy superb training conferences, including the pioneer ITA Dallas workshop and this joint ASIL-ITA program, but how many more should there be? How many more should we be supporting, at the expense—in substantial time and funds—of young and other aspiring entrants to a limited field?

Judge McDonald wrote to me: "Please do not accede to the time-worn excuse that we cannot find qualified arbitrators who are minorities." I definitely do not. I do not accede to that, because we surely can find them. My point is that I fear we have too many qualified arbitrators and lead counsel, of both genders and many races and nationalities, to fill the arbitrator positions available in the market.

This means that those of us who are already up on stage need to redouble our efforts to see that the positions available are filled with more diverse arbitrators and lead counsel, whose names may not surface in a five-minute identification exercise. This also means that those of you wanting to enter the field must be realistic about prospects, and be both persistent and patient – always persistent and somewhat patient.

This is the final equation I reach, including both factors and a result:

Caution + Reasonable Inclusion + Patience + Persistence = Better Diversity

The factors of *habit* and *bias* are out. The factor of *caution* stays in. The factors of *reasonable inclusion*, *patience*, and *persistence* are added, to achieve yet better diversity.

I look forward to listening to the panel discuss solutions. I hope one is extending the Pledge or encouraging pledges for other diversity categories, as I see the success of the Pledge as some evidence that my equation is good math.

Thank you very much.

GONZALO FLORES: Thank you, Lucy. Good morning everyone. Thank you very much for being with us today on this surprisingly sunny Washington D.C. morning. Allow me to start by thanking Lucinda Low and the American Society of International Law; Abby Cohen Smutny and the Institute for Transnational Arbitration; and, Won Kidane and Caroline Richard, the two chairs of this conference, for their invitation to participate in this event. I am delighted to be here, surrounded by so many friends, both in the discussion panels as in the floor. I would like join Abby, Lucinda, and Lucy in remembering David Caron who is a close friend of ICSID and a personal favorite of mine.

I am particularly honored to be commenting on the keynote remarks from Lucy, whom I have known for many years in the form of counselor, arbitrator, and expert in international law. Having said this before, I am terrified speaking about diversity and following on the steps of Lucy. Being a male in my middle age, I have a completely unfounded and undeserved confidence of my capacities. So, here I am.

I would like to focus on two points that I think I can synthesize from Lucy's remarks. I am going to call them "Talk the Talk, Walk the Walk."

On "Talk the Talk." In her remarks Lucy noted that she rarely speaks or writes about the particular topic on diversity and inclusion. The same applies to me and to many others who have been practitioners in the field of international law for a long time. The fact that we are talking about this today is extraordinarily important. One of the key factors of any form of exclusion or discrimination is that during its first stage, the excluded groups are not heard by the mainstream. For example, the lack of women in the legal profession is not a new problem. It is an old one that women have been discussing for quite a while. The good news is that the problem can become mainstream enough to be addressed as a general problem to be properly

discussed within the broader legal community.

Just two months ago, I sat on another panel, the ASIL panel, called "Women in Arbitration."[11] As this one, many other conferences are being organized to explore this important issue of diversity in international arbitration. When I joined ICSID in the '90s, this was not a topic of discussion, nor was transparency. We have come a long way on many aspects. Given that international arbitration is by definition a mechanism that seeks resolution of disputes between a diverse group of parties, subject to different legal systems, and represented by a diverse pool of counsel, it should be natural consequence that these disputes are decided by a diverse pool of adjudicators. But that the matter was not even a topic of discussion.

Lucy mentioned in her remarks that women cannot aspire to 1.5 women in a three-member tribunal. Maybe that aspiration should be three women in the three-member tribunal. In 2016 in an National Public Radio interview with Supreme Court Justice Ruth Bader Ginsburg, they discussed her experience as a woman in the U.S. highest court. The interviewer asked Justice Ginsburg: "How many women in the Supreme Court would be enough?" Her answer was: "When there are nine." She then added, "For most of the country's history there were nine, and they were all men. And nobody thought it was strange." The point that Justice Ginsburg was trying to convey was that we will not accomplish the task of having a fully inclusive system until the topic of diversity and inclusion is no longer a matter of discussion in academic and professional forum, but the norm. Until a three-female-arbitrator tribunal is no longer the "*Man-Bites-Dog*" headline referred to earlier by Lucy. Until conferences like this one are no longer needed. To that extent, we are "Talking

[11] ASIL, Women in Arbitration Panel (Jan. 10, 2018), available at https://www.youtube.com/watch?v=04ZXdDFdP5E.

the Talk"; initiatives like GQUAL[12] and The Pledge are positioning gender diversity at the forefront of the discussion.

In preparation for this conference, I mentioned to one of my few male colleagues at ICSID that I was going to be speaking about diversity and inclusion. He immediately said: "Well, you should talk about the large number of women that work in ICSID." He recognized diversity as a gender diversity. Diversity should be more than that. Gender diversity is key, but we should expand the concept. The important point is that the issue of gender diversity has already been implanted in our industry.

I also note that in Lucy's remark, when she referred to the "Five-Minute Rule,"—by the way we should take a lot of time when we are thinking about appointing an arbitrator—she stated that through this extra time of pondering, counsel could come up with more names of: (1) women with solid experience, (2) younger practitioners with solid experience, (3) non-Anglo-Europeans with solid experience. I do not know if this was on purpose, but you can see that there was in order: first, gender diversity; second, age diversity; third, geographical diversity. We have, all of us, this bias. We are focused on gender diversity, which is a key we need to expand the focus of diversity.

In a way, this is a three-phase process. There is a first phase, where exclusion is so strong that no one talks about the issue. That was 20 years ago. There is a second phase, where the issue is firmly positioned in the mainstream discussion. I think that is where we are today. We are discussing this very important topic. We should add a final phase where we no longer talk about these issues because it is no longer a problem. Progress undoubtedly has been made, but until we reach this new normal, it is

[12] GQUAL is a global campaign that seeks to promote gender parity in international tribunals and monitoring bodies. *See* GQUAL Website, About GQUAL, http://www.gqualcampaign.org/about-gqual/.

important that we continue "Talking the Talk."

Now let us "Walk the Walk." ICSID plays an important role in diversity in international investment dispute settlement system. We have taken numerous and concrete steps to address diversity and balance in the field and we are making ourselves accountable by publishing this data.

ICSID regularly collects data in the appointment of arbitrators in ICSID proceedings. You probably have seen our statistics that are published biannually. Lucy referred to the ICC's new practice of publishing all the names of arbitrators. ICSID has been doing this since its conception in 1966. We have taken important steps to include the representation of arbitrators, male and female, from all parts of the world, in international investment arbitration and consolidation cases.

Let us look briefly at some data. I do not want to bore you with statistics. On women in international arbitration, between 1966 and 2017, our data shows that more than 2,200 appointments were made and only 9% of the appointees were women. That is way below the rule of the 16%. This is disappointing, but there is surely an improvement through the years. In the calendar year of 2017, out of the 195 appointments made in ICSID tribunals, 19% were women. This is a huge increase. This includes an increase from the previous year, 2016, where only 13% of the appointees were female. We are breaking the 16% rule. The improvement in gender distribution also effects and improves other diversity metrics. In 2017, out of the 37 appointments of women, there were 18 different individual names and they were nationals of a dozen different states.

It is important to remember that the ICISD appointments are already fully measured. A large number of the appointments are made by parties. Roughly 75% of the arbitrator are appointed by the parties, not by the ICSID. It is interesting to know that, based on another report for the year 2017, 14% of all

appointments involved women. Out of this 14%, 87% were appointments made by the ICSID or the respondent state. The remaining 13% were appointed jointly by the parties. In the calendar year 2017, not a single woman was appointed by claimants individually or by the co-arbitrators. Thus, we still need to "Walk the Walk."

The ICSID has incorporated diversity awareness in its best practices for appointing individuals to the ICSID tribunals, consolidation commissions, and our home committees. We regularly include at least one woman when we make proposals in the ballot system in a list of five candidates to the parties. We have often carried member states to consider diversity when making designations for the panel of arbitrators and conciliators. This is specifically noted on our website which is called "Considerations for States in Designating Arbitrators and Conciliators the ICSID Panels" where we expressly say, "ICSID has actively sought to diversify the profile of candidates for appointment in the ICSID cases and encourages the designation of qualified persons of any gender, age, or national origin."[13]

As part of "Walking the Walk", in 2017, the Chairman of ICSID Administrative Council made, for the first time, 10 appointments to the panel of ICSID arbitrators in equal numbers: five women and five male candidates. Also, the ICSID provide practitioners in the field, male and female, opportunities to showcase their expertise in publications like the ICSID Review where we publish articles and comments in Spanish, English, and French. This is a great opportunity for other younger, new arbitrators from different geographical origins to expose and showcase a breadth of expertise that maybe is not available everywhere.

[13] Considerations for States in Designating Arbitrators and Conciliators to the ICSID Panels, available at https://icsid.worldbank.org/en/Documents/about/Considerations%20for%20States%20on%20Panel%20Designations-EN%20final.pdf.

Finally, we reflect our commitment to increase diversity in the composition for our own area. We have over 30 nationalities. We have the capacity of speaking over 25 languages and women comprise over 74% of the ICSID staff, including assistants, counsel, financial officers, deputy secretary general, and the secretary general.

No doubt there is still a significant distance to go to achieve greater diversity in international arbitration in all the different aspects I have mentioned. However, there is much more to be optimistic about. We have seen concrete changes, not just from a statistical perspective but also in the willingness of the parties, their counsel, and institutions to consider diverse arbitrators and "Walk the Walk."

As I have said, gender diversity is key but diversity is more than that. It has to be broader. Lucy mentioned today that she has been mistaken for Lucy Greenwood. I have been called Gustavo many times. In recent days, a distinguished arbitrator while handing me a document for comments said to me: "I expect 'fair if demanding' comments. Shouldn't that be the role of all of us to have a fair if demanding election process?" With that I conclude my remarks.

Thank you very much.

LUCY F. REED is a professor and Director, Centre for International Law National University of Singapore. In addition to Lucy's role in Singapore, she also sits as arbitrator in investment treaty and commercial arbitrations. Lucy is currently a Vice-President of the Singapore International Arbitration Centre and the International Council for Commercial Arbitration (ICCA), and formerly was a Vice-President of the ICC Court.

GONZALO FLORES is Deputy Secretary-General of the International Centre for Settlement of Investment Disputes (ICSID). Mr. Flores joined ICSID in June 1998, acting in different capacities during his tenure. As ICSID counsel, Mr. Flores served as secretary of tribunals in over 60 arbitration proceedings under the ICSID Convention, the ICSID Additional Facility Rules and the UNCITRAL Arbitration Rules. He also served as committee secretary in numerous annulment proceedings.

ITA CHAIR'S REPORT

by Joe Neuhaus Spring 2019

Dear members of the ITA community, I write to add my welcome to this inaugural issue of our new multimedia journal *ITA in Review* and to tell you about several other exciting developments now underway in ITA. I encourage all of you to join us in Dallas in June at the 31st Workshop and ITA Annual Meeting.

I. ITA IN REVIEW

With *ITA in Review*, our plan is to continue to provide the high-quality scholarly articles and analyses on key developments in the field that we have previously published in our print journal *World Arbitration and Mediation Review* but with the addition of a variety of new multimedia features enabled by the digital delivery format. We intend to offer selected "best of ITA" conference presentations not only via written transcripts but also with video and audio options. With linked text, photo galleries, and audio/video presentations for listening "on the go," this first issue provides examples of the range of content we can now offer. For future issues we welcome creative digital submissions.

II. SOME OTHER DEVELOPMENTS AND NEW INITIATIVES

While we are indeed excited about *ITA in Review*, I am equally happy to report major progress by ITA on other fronts as well. ITA has grown to all-time highs this year in membership, programs, and publications. We now count over 2,000 members and volunteer editors, reporters, speakers, and other annual contributors to the Institute's work (ITA community). With active committed leadership at all levels, and the welcome addition of new ITA Counsel Cecilia Flores Rueda and Staff Coordinator Véronique Fally, ITA is poised to continue to serve well its members and the international arbitration community at large.

A. *Young ITA*

Our Young ITA has enjoyed astounding growth since a major reorganization two years ago. Young ITA membership has grown from 23 members and two officers in 2017 to over 1,200 members and 13 officers now in 69 countries. Young ITA programs

growth has been equally impressive. In 2018 alone, 16 two-three hour #YoungITATalks programs were presented in 14 cities and 11 countries around the world: Dubai, Frankfurt, Guatemala City, Lima, London (3), Miami, New Delhi, New York, Paris, Quito, São Paulo (2), San José (Costa Rica), and Washington, D.C. Almost 1,000 registrants and speakers participated in these conferences. These programs were presented by both younger counsel and some of the world's most prominent arbitrators. A Conference Report and Photo Gallery of the #YoungITATalks Costa Rica program are presented elsewhere in this issue of *ITA in Review*. Gary Born's keynote on "The Future of International Arbitration" at the #YoungITATalks Lima program is available in both video and audio formats in this issue.

Thanks for this outreach to the next generation of international arbitration counsel are due to the Young ITA Chair Silvia Marchili (White & Case, Houston and Miami), Vice Chair Elizabeth Delaney (Senior Corporate Counsel–Litigation, Occidental Petroleum, Houston), Communications Chair Robert Landicho (Vinson & Elkins, Houston), and our eight Regional Chairs: South America Chair José María de la Jara (ABA Rule of Law Initiative Peru, Lima), Europe Chair Rocío Digón (White & Case, Paris), North America Chair James Egerton-Vernon (Jones Day, DC), Africa Chair Demilade Isioma Elemo (Folashade Alli & Associates, Lagos), Brazil Chair Pedro Guilhardi (Nanni Advogados, São Paulo), Central America Chair Karima Sauma (Executive Director, AmCham Costa Rica, San José), Asia Chair Aditya Singh (White & Case, Singapore), and UK Chair Tomas Vail (London).

The 1st Young ITA Mentorship Program is now underway under the excellent leadership of Mentorship Chair Laura Sinisterra, with 16 mentors, 64 mentees and 16 facilitators participating, and by all accounts proceeding well. The next program will begin in the fall, with applications available this summer. Many thanks to this year's mentors Crina Baltag, Lorraine de Germiny, Gaëlle Filhol, Cecilia Flores Rueda, Christophe Guibert de Bruet, Hugh Hackney, Bart

Legum, Elina Mereminskaya, Philippe Pinsolle, Dietmar Prager, Monique Sasson, Luke Sobota, Pablo Spiller, and Epaminontas Triantafilou.

The 1st Young ITA Writing Competition and Award: "New Voices in International Arbitration has produced its award winner: Damien Charlotin, a Ph.D. Candidate at Cambridge University. The $3,000 cash award will be presented during the Advisory Board's Annual Dinner in Dallas on June 20 and the paper will be published in a future issue of *ITA in Review*. Thanks are due to Young ITA Thought Leadership Chair Dr. Crina Baltag for organizing so well this first competition, to final round judges Prof. Chip Brower, Dominique Brown-Berset, and Jim Loftis, and to first round judges Crina, Silvia Marchili, Liz Devaney, Rob Landicho and Laura Sinisterra.

Finally, I am very pleased to announce the new chair and vice chair of Young ITA for the 2019-2021 term: Robert Landicho (Vinson & Elkins, Houston) will serve as chair and Dr. Crina Baltag (University of Bedfordshire, Luton, UK) will serve as vice chair. Other leadership positions for the 2019-2021 term will be determined by an application process now underway.

B. *ITA-IEL-ICC Joint Conference on International Energy Arbitration – Singapore*

ITA and the Institute for Energy Law joined forces on an international energy arbitration conference in Houston in 2014, joined by the ICC International Court of Arbitration in 2016. The program has grown each year since inception. Buoyed by this success and the apparent demand for a top-quality program focused on this important area of international arbitration, the ITA, IEL, and ICC decided last year to develop a similar collaboration for Asia and settled on Singapore as the venue.

The first ITA-IEL-ICC Joint Conference on International Energy Arbitration– Singapore will be presented in Singapore on September 18-19, 2019, organized by co-chairs Edmund Chan (General Counsel, ExxonMobil Asia Pacific Pte Ltd, Singapore), Wade Coriell (King & Spalding, Singapore) and Nicholas Lingard (Freshfields Bruckhaus Deringer, Singapore). We hope this initial effort will provide a footprint for future programs in the region. If your practice or interest includes Asia, please make your plans now to join us in Singapore.

C. *Ongoing Activities*

The developments outlined above are of course only a few of the many activities now underway in ITA, including the Academic Council's annual ITA-ASIL Conference and ongoing oral history video project, the Americas Initiative's annual Americas Workshop, the Spanish-Portuguese language listserv ITAFOR, the monthly ITA Arbitration Report at KluwerArbitration.com now with 81 reporters covering 60 jurisdictions, our Online Education library offering over 20 hours of CLE-accredited video programs, Observer participation in UNITRAL Working Group III, and Task Forces on In-House Counsel, UNCITRAL, Nominations, and Podcasts.

D. *31st Workshop and ITA Annual Meeting*

It all comes together at the annual Workshop and Annual Meeting each June in Dallas. There members, speakers, editors, academics, young lawyers, and new participants gather for education, business networking, dialogue, and a bit of fun as well.

Please make your plans now to join us this year on June 19-21 at the 2019 Annual Meeting and Workshop: Adjudicating Changed Circumstances in Commercial and Treaty Arbitration. Here are some highlights:

- Organized and led by co-chairs Dean Céline Lévesque (University of Ottawa Ottawa), Tom Sikora (Senior Counsel, Exxon Mobil Corporation), and Gäetan Verhoosel (Three Crowns, London).
- Two keynote addresses will be delivered: by Prof. Klaus Peter Berger (Institute for Banking Law, University of Cologne) and Yas Banifatemi (Shearman & Sterling, Paris).
- The Workshop luncheon will feature an oral history interview with Prof. George Bermann, Columbia Law School, New York) by Prof. Susan Franck (American University Washington College of Law, Washington, D.C.).
- Among our many exceptional speakers this year, our program will include Julie Bédard (Skadden, Arps, New York), Paula Hodges (Herbert

Smith, London), Philippe Pinsolle (Quinn Emanuel, Geneva), and Eduardo Zuleta (Zuleta Abogados, Bogotá) and the leaders of our burgeoning Young ITA.

- Multiple networking and social events, including the Oral History Luncheon, Welcome Reception and Workshop Dinner.

ITA members—who attend tuition-free—can also participate in ITA Annual Meeting activities including the Advisory Board Dinner Meeting, committee meetings, and the ITA Forum, our annual informal, off-the-record discussion of current developments and concerns among ITA members, Workshop Faculty, and special guests.

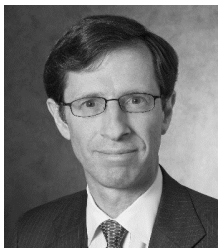
E. *Finally, a Reminder*

You may know that ITA is one division among several of The Center for American and International Law (CAIL). CAIL's other institutes and programs address important developments in legal fields ranging from international business to energy to technology to law enforcement. I encourage you to visit the CAIL website at www.cailaw.org and to encourage colleagues with interest in these fields to join the CAIL institute in their area of practice and enjoy the benefits membership provides.

III. CONCLUSION

ITA's success depends on the active participation and support of its members in programs, publications and new initiatives. If you are already a member, please do let us know of your interests, suggestions, and any concerns. If you are not already a member, please join us now.

Sincerely,



JOSEPH E. NEUHAUS is the Chair, Institute for Transnational Arbitration Advisory Board. In addition, Joe is a partner at Sullivan & Cromwell LLP where his practice focuses on international commercial litigation in both arbitral and court settings. He is coordinator of Sullivan & Cromwell LLP's arbitration practice and has served as counsel and arbitrator in numerous arbitral proceedings, including *ad hoc* proceedings, arbitrations administered by the ICC and the AAA, and in arbitrations involving sovereign entities.

THE HONORABLE CHARLES N. BROWER'S REMARKS IN HONOR OF MR. EWELL "PAT" MURPHY AND MR. DAVID D. CARON

by The Honorable Charles N. Brower

Tonight, as in other ways since their deaths earlier this year, just one month apart, we honor two former chairmen of the Institute for Transnational Arbitration—ITA, Ewell "Pat" Murphy, our founding chairman, and David D. Caron, our sixth leader.

Starting with our founder, I read a slightly adapted Chapter 1 of Genesis, the opening book of the Old Testament of the Bible:

> In the beginning [the legal gods of Texas] created the [southwestern legal foundation] [but the foundation long] was formless and empty [as regards transnational arbitration], darkness was over the surface of [this void], and the spirit of one Ewell "Pat" Murphy was hovering over the surface of [it].

The "beginning" was 1947. Pat Murphy succeeded 39 years later, in 1986, in persuading the foundation, now the Center for American and International Law, to establish the ITA, which three years later, in 1989, presented the first of its annual workshops, which I, in fact, attended and the latest of which we have experienced today.

Pat's life was truly a Horatio Alger's story.[1] Born in 1928 in Washington, D.C., a descendent of a civil war general, he grew up in San Angelo, Texas, the county seat of Tom Green County and the site of Fort Concho and its buffalo soldiers.

He displayed excellence, leadership, and precocity from the start. Valedictorian of his class of 1943 at San Angelo High School. Then, following a year at San Angelo Junior College, he moved to the University of Texas, where he earned his B.A. with Honors in 1946 (at age 18!) and his LL.B., also with Honors, in 1948 (at the ripe old age of 20!).

In his last year at the law school he became what I suspect may be the youngest Rhodes Scholar in the history of the Rhodes Trust, and proceeded to study comparative constitutional law at St. Edmund Hall at Oxford University. True to Pat's by then well–established form, he became President of St. Edmund Hall's student

[1] Horacio Alger, Jr. – Biography, https://www.horatioalgersociety.net/100_biography.html.

body while also serving as coxswain of its crew. Pat graduated with a Ph.D. in 1951 (aged 23!). A year later he was commissioned a lieutenant in the United States (U.S.) Air Force, and was sent to Dhahran, Saudi Arabia, for two years as a Judge Advocate.

I pause here to note that Pat's assignment to Dhahran turned out to be fateful for the future ITA. Dhahran was the location of the Arabian-American Oil Company, known as ARAMCO; at the time owned by four American oil companies. The General Counsel of ARAMCO was one Bill Owen. It seems that Bill and Pat met there, and when Bill later retired and moved to Texas their friendship continued.

Bill had developed a serious interest in international arbitration, beginning with the fact that in the mid-1950's ARAMCO had arbitrated with the Kingdom of Saudi Arabia, claiming that the Kingdom's grant to Aristotle Onassis of the exclusive right to ship the oil produced by ARAMCO violated ARAMCO'S concession agreement. ARAMCO won that case, in which it happened to have been represented by White & Case LLP, my former law firm (though before I arrived there). Pat's friendship with Bill led to Bill becoming the second person to chair our advisory board (1989-1992), following Pat's stint as our first chairman (1986-1989). Older ITA members doubtless would reminisce with me about sitting with Bill over drinks of an evening following the day's events at our June workshop sessions; usually also with Bill's wife, a terrific lady who was both Bill's first wife and his third one (there was no fourth!).

But back to Pat. Following Saudi Arabia and the Air Force, Pat joined Baker Botts, where he spent the rest of his career at the bar and became known as "Mr. International Law" throughout Texas, and beyond. To cite his many achievements and awards, professionally; as a civic leader on many fronts; later as a teacher at both the University of Texas Law School and at the University of Houston Law Center; not to mention his warm and engaged personality; his exemplary family life; and his mentoring of so many, would take us past midnight and into tomorrow. One award, however, is of special relevance to the ITA. In 2008 the Institute decided to create an award "for exceptional civic contributions and extraordinary professional achievements in international arbitration." Most fittingly, it was then first bestowed on Pat and named in perpetuity the "Pat Murphy Award".

As I noted on that occasion, addressing Pat via a video recording, his favorite philosopher was Jose Ortega y Gasset, who had penned the following:

> We distinguish the excellent man from the common man by saying that the former is the one who makes great demands on himself, and the latter, who makes no demands on himself.[2]

Continued then, as I now conclude this part of my remarks this evening, as follows: Honor be to you, Pat, the quintessentially "excellent man"!

I turn now from our unforgettable founder, who died earlier this year in his 90th year, to my beloved first law clerk in The Hague (1984-1985) and lifelong friend, David D. Caron. David, the ITA's sixth leader, died a month after Pat Murphy at age 65, depriving all of us of the fruits of his future activities, which might have extended another 25 or more years.

David, too, was, like Pat, a Horatio Alger's story.[3] His parents were quite simple folks who emigrated from Quebec, Canada, to Connecticut. David was the youngest of three children. Up until the age of 12 he was known as the "class clown". That changed forever, however, when his father suffered a crippling stroke when David was 12 years old and the burden of helping both of his parents fell most heavily upon him. His older brother, already at college, quit his studies to work and help support the family for a while. His sister, the middle child, was within a year and a half of graduating from high school. Immediately, and ultimately, it was all up to David from age 12 to age 18.

In the summers he worked in the shade-grown tobacco fields outside of Hartford, Connecticut, laboring under the burning sun and the relentless humidity. Those fields produced wrapper leaves for cigars. His graduating class voted David the most studious, the most mature, and the most likely to succeed.

With, as his brother has told me, "like, really, no money at all, whatsoever", David applied to the Coast Guard Academy, which would give him a free college education, and cadet's pay in addition. These, together, would enable David to prosper professionally and relieve his family of any need to support him. So, apply he did, and

[2] JOSE ORTEGA Y GASSET, THE REVOLT OF THE MASSES, (trans. Anonym.) (New York W.W. Norman 7 Co., 1932) p. 63.
[3] *Supra* note 1.

his application was rejected! Why? Apparently, the academy would not accept anyone as a cadet who had a severe underbite. His lower front teeth projected beyond his upper front teeth, which apparently was not acceptable in a future officer. What to do? The only solution was to suffer one's jaw to be surgically broken and reset. David underwent the procedure at age 18 an extremely painful experience, which, as his wife Susan recalls, caused him during the ensuing summer to receive his nutrition mainly through a straw! If anyone ever had doubted David's resolve to advance in life, this fact, which I learned only after his death, must resolve any such doubt.

At the Academy David prospered, graduating not only with honors, but also as the commander of the Cadet Corps, the anointed leader of the entire student body. He, too, thus showed the highest leadership qualities from an early age.

Yet, more challenges faced him. His first assignment as a freshly minted Ensign was on the "Polar Star", an icebreaker, where he served as navigation and diving officer. When we first met in The Hague in 1984 and he told me this, I said "surely you did not dive in arctic waters!" His dry reply was "of course I did, for example when a propeller would be fouled." He then proceeded to relate to me a memorable incident when he came rather too close to losing his life while diving in the arctic. Ever the rock solid, steady soul that David was, that experience did not prevent him from taking his wife and children on diving vacations in later years.

His second assignment, in San Francisco, I have always felt influenced him to attend law school at Berkeley. But not before post-coast guard service, however, he spent a year in Cardiff, Wales, on a Fulbright scholarship, obtaining a master's degree in marine law and policy. As he related later to an interviewer, he was told that to "fit in" in Wales, he would have to either (i) play rugby or (ii) sing. Though built well for rugby, he chose to sing with the Cardiff Polyphonic Choir.

David in fact spent a lifetime singing, with a beautiful second bass voice. He and Sean Murphy, now president of the American Society of International Law (ASIL), loved to tell the story of when David and his wife Susan spent a sabbatical year in Washington, D.C., the first year that David presided over ASIL. Sean was driving them

downtown and in passing the National Cathedral he pointed it out to them. When David responded "yes, I know the National Cathedral because as a cadet I sang there with the Academy's Glee Club at the memorial service for President Truman". Sean burst out with "just how old are you, David?" David and his Coast Guard Academy Glee Club also sang later at the second inauguration of President Nixon. While stationed in San Francisco, David sang with the Oakland Symphony Orchestra. I first experienced his singing voice when he clerked for me at the Iran-United States Claims Tribunal and sang at the church wedding of a Dutch tribunal law clerk to an American, who later also clerked with us, in Scheveningen. As you will see, David's singing became a trademark of his service everywhere.

As a student at Berkeley, David fell under the tutelage and mentorship of the legendary professor Stefan A. Riesenfeld, who proclaimed David "the best student I have ever taught!" He graduated Order of the Coif, won the Thelen Marrin Prize for outstanding student scholarship, was the Editor-in-Chief of the school's "Ecology Law Quarterly" and was a member of the ASIL's Executive Council Ex Officio as the head of the International Law Students Association.

After graduating from Berkeley, David and I came into each other's lives when I arrived in The Hague and David clerked for me at the Iran-United States Claims Tribunal. While working very hard at that job he managed to attend The Hague Academy of International Law and become only the 25th American, up to that time, to earn the Academy's coveted diploma. David also earned during that period the Dutch advanced degree of Doctorandus at the University of Leiden, which was followed five years later by his being awarded at the same University his Doctorate in International Law. He left me after nearly two years to be a Senior Research Fellow at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg, Germany.

Though thereafter he took up his post at Berkeley, which he held with increasing renown for 26 years, early being chaired as the C. William Maxeiner Distinguished Professor of Law, he returned frequently to The Hague Academy. Only two years after leaving the Tribunal, in 1987, he returned to the academy as the director of

studies (English); a quite unusually swift step-up. In 1995 he returned there again as the director of research (English), and then returned in 2006 to give a series of important lectures entitled "A Political Theory of International Courts and Tribunals".[4]

David would typically sing to his students, whether at Berkeley, The Hague Academy, or elsewhere, who especially were entertained by his stunning imitations of Elvis Presley, adapting the words to the audience, for example, "Amazing *Grades*" and "*Grade* Me Tender."

Along his academic road, David was frequently engaged in practice and in public service. Apart from chairing the ITA's Advisory Board, David served as President of the ASIL, on the Board of Editors of the American Journal of International Law. He also played important roles with the Marshall Islands Nuclear Claims Tribunal and before the Eritrea-Ethiopia Claims Commission. He served as a Commissioner of the United Nations Claims Commission and chaired the World Economic Forum's Global Agenda Council on The International Legal System, among many other activities.

While still at Berkeley, David increasingly became a much sought-after expert witness, advocate, and arbitrator in prominent international arbitrations, so much so that he qualified as a Barrister—a member of the Bar of England and Wales—and was invited to join 20 Essex Street Chambers in London, renowned for its work in public international law and international dispute resolution. Always playful, David proudly displayed his wig in his Berkeley office and his later ones.

Through these later Berkeley years David and I schemed to have him achieve his life's highest ambition, to be an international judge in The Hague.

First, however, in 2013 David was chosen to be the Executive Dean of the Dickson Poon School of Law at King's College London. It was the ideal deanship, as Sir Dickson Poon, a Hong Kong businessman, had just donated 20 million British Pounds to King's College for the purpose of improving its law school. David's principal task was to spend the money wisely and achieve Sir Dickson's goals; which indeed David did.

[4] David D. Caron, *Towards a Political Theory of International Courts and Tribunals*, 24 BERKELEY J. OF INT'L L. 401 (2007).

Being already a barrister and a member of a leading London Chambers, David soon found himself made a bencher of the inner temple and—surprise, surprise—singing with the Parliament Choir, composed almost exclusively of members of the House of Commons and the House of Lords, slightly augmented by a few added worthies. While at King's College, David's star continued to rise still higher in the firmament of international law. In the summer of 2015 he was elected to the prestigious Institut de Droit International as one of only seven or so Americans then so honored, and shortly thereafter was appointed as judge *ad-hoc* of the International Court of Justice (ICJ), one of only four Americans ever to serve in that capacity.

Then, as of the 2nd of December 2015 David's dream, and mine for him, was finally realized: he was appointed by the U.S. to succeed me as a titular judge of the Iran-United States Claims Tribunal and arrived in The Hague to assume that office. It was the happiest moment of his professional life and for me the success of a long campaign. We were both overjoyed. Even then, David's successes continued, as soon he was appointed again, this time by the U.S., as judge *ad hoc* at the ICJ, thereby becoming the only American ever to be so appointed more than once.

Then David was struck down on the 20th of February this year by septicemia.

Both Pat and David recall to my mind the following quotations from three quite different writers, which to me characterize their lives:

1. Pat's favorite philosopher, Ortega y Gasset: "An 'unemployed' existence is a worse negation of life than death itself."[5]
2. Johann Wolfgang von Goethe, the German author of the classical period: "Duty means loving that which one makes imperative upon oneself."[6]
3. Abraham Lincoln, when barely 23 years old, announced in the March 9, 1832 issue of the "Sangamo Journal" his candidacy for the Illinois State Legislature: "Every man is said to have his peculiar ambition. Whether

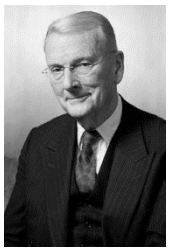
[5] ORTEGA Y GASSET, *supra* note 2.
[6] Attributed to Johann Wolfgang von Goethe.

it be true or not, I can say for one that I have no other so great as that of being truly esteemed of my fellow men, by rendering myself worthy of their esteem."[7]

With this word, penned also by Johann Wolfgang von Goethe, I speak for all of us in respect of Pat and David:

> In the face of the great superiority of another person
> there is no means of safety but love.

Pat and David, we loved you then, we love you now, and we will love you evermore.



THE HONORABLE CHARLES N BROWER has been a Judge of the Iran-United States Claims Tribunal in The Hague since 1983 and has served as Judge *Ad Hoc* of the Inter-American Court of Human Rights. He has been Acting Legal Adviser of the United States Department of State, Deputy Special Counsellor to the President of the United States, and a member of the United States Secretary of State's Advisory Committee on Public International Law, of the Register of Experts of the United Nations Compensation Commission and the Panels of Arbitrators and Conciliators of the International Centre for Settlement of Investment Disputes. He is a past President of the ASIL and Chair of the Advisory Board of the ITA. He is a former partner and Special Counsel at White & Case LLP in both New York City and Washington, D.C., where he handled litigation in federal and state courts throughout the U.S., including jury trials, bench trials, and appeals, in a wide range of civil, administrative, and criminal proceedings, while specializing during the last 30 years in the handling of disputes involving States or State entities before international courts, tribunals and commissions. He is also a member of 20 Essex Street Chambers in London. In 2009 Judge Brower was awarded the American Society of International Law's Manley O. Hudson Medal for "pre-eminent scholarship and achievement in international law ... without regard to nationality," and in 2010 received the Stefan A. Riesenfeld Award of the University of California Berkeley School of Law (Boalt Hall) in recognition of "outstanding achievements and contributions in the field of international law." In 2015, he became the fourth recipient of the Global Arbitration Review's Lifetime Achievement Award.

[7] Abraham Lincoln, *First Political Announcement*, SANGAMO J., Mar. 9, 1832, http://www.abrahamlincolnonline.org/lincoln/speeches/1832.htm.

YOUNG ITA CHAIR'S REPORT 2018-2019

by Silvia Marchili

Young ITA promotes the involvement of young professionals (under 40) in the international arbitration community through programs, publications, competitions, and other activities. In addition, Young ITA encourages young professionals to become more involved with the ITA as a whole.

In 2018, Young ITA has built upon its exponential growth, and now has over 1200 members on six continents. But perhaps most importantly, Young ITA has emerged as a premier young arbitration group with a truly global footprint.

I. YOUNG LAWYERS ROUNDTABLES

Young Lawyers Roundtables are presented annually during the ITA Workshop in Dallas, the ITA-IEL-ICC Joint Conference on International Energy Arbitration in Houston, and the ITA Americas Workshop in Latin America. A review of the 2018 Young Lawyers Roundtables is below.

A. *5th ITA-IEL-ICC Joint Conference on International Energy Arbitration*

The Young Lawyers Roundtable for the 5th ITA-IEL-ICC Joint Conference on International Energy Arbitration was held on January 18–19, 2018, in Houston. Co-Chairs Silvia Marchili (Young ITA Chair and Regional Chair, ICC YAF North America Chapter, King & Spalding LLP, Houston) and Soledad G. O'Donnell (IEL YEP Representative, Mayer Brown, Chicago) put together a fantastic program.

The Faculty on the first panel, entitled "*Mexican Energy Disputes–A New Era*" included Prof. Julián de Cárdenas Garcia (University of Houston Law Center, Houston), Cecilia Ibarra-van Oostenrijk (TechnipFMC, Houston), Raymundo Piñones de la Cabada (Mexico Association of Hydrocarbons (AMEXHI), México City), and Gabriel Salinas (Avant Energy, Houston). This panel, composed of in-house counsel, academics, and representatives from trade organizations, had many highlights, including a deep dive into NAFTA negotiations, and some initial impressions of Mexico's investment climate after the recent hydrocarbons law reforms.

The Faculty on the second panel, entitled "*Arbitrator Selection*" included José

Ricardo Feris (Squire Patton Boggs, Paris), Robert Landicho (Vinson & Elkins LLP, Houston), Elizabeth McKee Devaney (Occidental Petroleum Corporation, Houston) and Victoria Shannon Sahani (Arizona State University, Phoenix). The panel discussed many different issues that arise when proposing potential arbitrators to their clients, including the ethical considerations of communicating with arbitrator candidates prior to appointment, diversity and inclusion, and case-specific factors that may drive the selection process.

B. 30th Annual ITA Workshop and Annual Meeting

The Roundtable comprised two panels: "*Human Rights and Environmental Disputes in International Arbitration*" and "*A Tour Around the Arbitration World*".

The speakers on the first panel were: Robert Landicho (Young ITA Communications Chair, Vinson & Elkins LLP, Houston), Laura Sinisterra (Young ITA Mentorship Chair, Debevoise & Plimpton LLP, New York), and Lorraine de Germiny (LALIVE, Geneva). Dr. Crina Baltag (Young ITA Thought Leadership Chair, University of Bedfordshire, UK) moderated the panel, prompting a deep dive into how human rights and environmental issues find their way into commercial and investor-State disputes, and proactive steps that investors can take to curb potential human rights and environmental issues when implementing their projects.

The Second panel included Damien Nyer (White & Case, New York), Pedro Guilhardi (Brazil Chair, Nanni Advogados, São Paulo), Karima Sauma (Mexico & Central America Chair, International Center for Conciliation and Arbitration, AmCham Costa Rica), and Tomas Vail (United Kingdom Chair, White & Case LLP, London). The panel was moderated by James Egerton-Vernon (North America Chair, Jones Day, Washington, DC), and James led a fulsome discussion of recent international arbitration developments in each region.

II. #YOUNGITATALKS

#YoungITATalks is a series of local events presented around the world. The format of each of the talks vary, ranging from workshops, interviews, panel discussions, debates, or other presentation formats that cover a wide range of

subjects relating to arbitration. The #YoungITATalks series is designed to educate, to promote conversation, and to share knowledge and experiences among young practitioners throughout the world. During 2018, Young ITA hosted 15 #YoungITATalks in 12 cities.

A. *#YoungITATalks*, São Paulo

TozziniFreire Advogados hosted the event *Arbitragem e Eficiência: Café da Manhã com Arbitragem*, which took place on April 11, 2018.

The Faculty included: Pedro Guilhardi (Young ITA Brazil Chair, Nanni Advogados, São Paulo), Rafael Medeiros Mimica (TozziniFreire Advogados, São Paulo), Francisco José Cahali (Cahali Advogados e Mestre, Pontifícia Universidade Católica de São Paulo, PUC), Carolina da Rocha Morandi (AMCHAM Brasil, São Paulo), and Pedro Bento de Faria (TozziniFreire Advogados, São Paulo).

B. *#YoungITATalks, London*

On May 1st, 2018, the program "*Oil/Gas Arbitration Involving States and State Entities: Selected Procedural and Substantive Issues*," has hosted by White & Case in London. The lively discussion focused on the unique legal issues that arise when states and state entities are involved, with counsel sharing their experiences (both on procedure and merits) and perspectives. The panel included representatives of both energy companies and state entities represented.

The all London Faculty included: Margaret Ryan (Shearman & Sterling), Olivia Valner (Freshfields Bruckhaus Deringer), Scott Vesel (Three Crowns), Sylvia Tonova (Jones Day), Saadia Bhatty (Gide Loyrette Nouel) and Tomas Vail (White & Case).

C. *#YoungITATalks, Quito*

AmCham Quito and Andrade Veloz co-sponsored the YoungITATalk *Arbitration Skills Workshop*, on June 1, 2018, moderated by José María de la Jara (Bullard Falla Ezcurra +, Lima).

The first session started with a simulation of the kick off meeting between a client and its attorney, and then shifted to the theory of designing a persuasive arbitral case.

The panelists were Hugo García (Carmigniani & Perez, Quito) and Mario Reggiardo (Bullard Falla Ezcurra +, Lima).

The second session included a simulation of a cross examination, as well as the theory of how to execute an effective cross-examination. The panelists were Carolina Arroyo (Andrade & Veloz, Quito) and Patricia Vera (Center of Arbitration of the American Chamber of Commerce, Quito).

D. #YoungITATalks, Frankfurt

On June 13, 2018, White & Case hosted the YoungITATalk, "*Tech Projects in Asia: Implementation and Disputes—Lessons Learned From In-House and Counsel Perspective*." In two panel discussions, the moderator, panelists, and the audience engaged in a lively and inspiring debate. Introductions were made by Rocío Digón, (Young ITA Continental Europe Chair) and Alexandra Diehl (White & Case LLP, Frankfurt).

The first panel, moderated by Heiko Heppner (Dentons, Frankfurt), covered the issue of "*Cultural and other Pitfalls in Tech Projects in Asia and How to Avoid Them*." The panelists were Alexander Genz (Fujitsu Electronics Europe) and Christian M. Theissen (White & Case LLP, Frankfurt).

The second panel discussed the issue of "*Solving Tech Disputes in Asia Most Effectively*," moderated by Mariel Dimsey (CMS Hasche Sigle in Hong Kong). The panelists were Clemens-August Heusch (Nokia) and Matthew Secomb (White & Case LLP, Singapore).

E. #YoungITATalks, Lima

Hosted by Bullard Falla Ezcurra +, YoungITATalk "*Technology and the Future of International Arbitration*," was held together with ICC YAF, on August 8, 2018. The panelists discussed the various opportunities and challenges that new technologies bring to international arbitration, especially when appointing arbitrators and with respect to evidence.

Eduardo Zuleta (Vice Chair, ITA and Vice President, ICC International Court of Arbitration, Zuleta Abogados, Bogotá) gave the welcome remarks. Following, Gary

Born (Wilmer Hale, London) addressed the keynote speech "*The Future of Arbitration*."

The panel "*The Use of Technology in International Arbitration*" was moderated by Julio Olórtegui (Bullard Falla Ezcurra +, Lima). Briana Canorio (ICC YAF Representative for Latin America, Petroperú, Lima) addressed the topic "*Blockchain, Smart Contracts and Arbitration*"; Francisco Paredes (Laudenlaw, Washington D.C. / Quito) addressed the topic "*Machine Learning, Automation of Litigation Tasks*;" Diana Garate (Rebaza Alcázar & De Las Casas, Lima) the topic "*Augmented Reality and New Evidence Methods*;" and José María de la Jara (Young ITA South America Chair, Bullard Falla Ezcurra +, Lima) referred to the topic "*Are We Ready for Arbitral Robots*?." Christopher Drahozal (Arbitrator Intelligence, Lawrence, Kansas) presented on "*Arbitration Intelligence and the Search for Diversity*." Diana Correa (ICC YAF Representative for Latin America, Correa International, Bogotá) and José María de la Jara provided closing remarks.

F. Informal Summer Drinks and Canapes (London)

On August 16, 2018, Vinson & Elkins London hosted an informal evening of drinks and socializing.

G. #YoungITATalks, New York

Freshfields Bruckhaus Deringer sponsored YoungITATalks, New York: "*US Law and International Commercial Arbitration: A Changing Landscape*," on September 25, 2018.

Speakers and participants held a lively discussion on the impact of recent decisions in United States (U.S.) courts on international arbitration, especially with regard to personal jurisdiction and non-signatories. The speakers and moderators included: Ananda Burra (Jones Day, New York), Tom Childs (King & Spalding, New York), Rocío Digón (Young ITA Continental Europe Chair), Ben Love (Freshfields Bruckhaus Deringer, New York), Sam Prevatt (Freshfields Bruckhaus Deringer, New York), Victoria Sahani (Arizona State University School of Law, Phoenix), Lindsey Schmidt (Gibson Dunn, New York), and Kristen Weil (Dentons, New York).

H. #YoungITATalks, Washington, D.C.

YoungITATalks, Washington D.C., featured a program on "*International Arbitration in the United States*." The event was sponsored by Jones Day and was held on October 3, 2018.

The event included two panel discussions, addressing the future of investment treaties in the U.S., and the treatment of arbitration agreements and awards by U.S. courts. In the first panelists Christina Beharry (Foley Hoag, Washington D.C.), Kathleen Claussen (University of Miami School of Law, Miami), and Mirea Lynton Grotz, (Washington D.C.), moderated by Young ITA North America Chair, James Egerton-Vernon (Jones Day) discussed the topic "*The United States and Investment Treaties: The Next Ten Years*."

In the second panel, panelists Csaba Rusznak (Arnold & Porter, Washington D.C.), Kristen Young (White & Case, Washington D.C.), and Caroline Edsall Littleton (Jones Day, Washington D.C.) moderated by Simon Consedine (Three Crowns, Washington D.C.) discussed on "*International Arbitration in the U.S. Courts*."

I. #YoungITATalks, London

On October 23, 2018, YoungITATalks, London "*The ICSID Secretariat's Proposals for Rule Amendments: The Times They Are A-Changin'*," took place at White & Case. The ICSID Secretariat recently proposed amendments intended to modernize the ICSID rules, to offer States and investors a range of effective dispute settlement mechanisms. This event addressed these suggested changes, with counsel sharing perspectives on the proposed amendments and related anecdotes from their experience.

Faculty on the first panel "*The ICSID Secretariat's Proposals for Rule Amendments: Improvements to Efficiency*," included Govert Coppens (Volterra Fietta, London), Helen Llehto (Hannes Snellman, Helsinki), and Jean Paul Dechamps (Dechamps Law, London), moderated by Tomas Vail (White & Case, London). The second panel "*The ICSID Secretariat's Proposals for Rule Amendments: Transparency and Special Procedures*," included Evgeniya

Rubinina (Freshfields Bruckhaus Deringer, London), Lorraine De Germiny (Lalive, Geneva), and Bernhard Maier (Squire Patton Boggs, London) on the faculty, moderated by Zsofia Young (Fietta, London).

J. #YoungITATalks, São Paulo

On October 24, 2018, Pinheiro Neto Advogados, São Paulo, and Arbitration Intelligence co-sponsored a YoungITATalks program, entitled: "*Challenges in the Choice of Arbitrators: How to Consider Experience, Transparency and Diversity in the Nomination Process and in the Formation of the Arbitral Tribunal*?"

The topic was debated by Pedro Guilhardi (Young ITA Brazil Chair, Nanni Advogados, São Paulo) together with Gabriella Bianchini (Sanders Phillips Grossman, London, UK), Maurício Pestilla Fabbri (Cescon, Barrieu, Flesch & Barreto Advogados, São Paulo), Rafael Villar Gagliardi (Demarest Advogados, São Paulo), Renato S. Grion (Pinheiro Neto Advogados, São Paulo), Marcela Kohlbach (Leste, Rio de Janeiro), and Thiago Del Pozzo Zanelato, (Arbitrator Intelligence (Latam Campaign), Pinheiro Neto Advogados, São Paulo).

K. #YoungITATalks, New Delhi

Young ITA and the Centre for Trade and Investment Law, IIFT, put together an excellent program "*Investment Arbitration in India: Challenges and Opportunities*" on October 29, 2018. In recent years, India has emerged as one of the most frequent respondents in investor-state arbitration. In response, the Government has taken a series of dramatic steps to alter the investment treaty regime in India. For instance, it has extensively revised its Model BIT, which serves as a template for investment treaty negotiations. The Government has also served BIT termination notices to nearly 60 countries, stating that it intends to replace the existing agreement with new BITs containing less expansive protections. The panel, with participants from foreign and domestic law firms, academia, government and the bar, discussed the impact of those developments.

Dr. James Nedumpara (Professor and Head, Centre for Trade & Investment Law)

and Aditya Singh (Young ITA Asia Chair; White & Case, Singapore) provided the introductions and welcome remarks. Next, panelists Justice Indu Malhotra (Supreme Court of India), Arvind Datar (Supreme Court of India), K Rajaraman (Department of Economic Affairs, Government of India), Niti Dixit (S&R Partners) and Dipen Sabharwal (White & Case) discussed the numerous challenges and opportunities that have accompanied the increase in international investment arbitration with India. The program was moderated by Dr. Prabhash Ranjan (South Asian University).

L. #YoungITATalks, Guatemala City

Universidad Francisco Marroquin was the venue for #YoungITATalks, Guatemala City titled "*Hot Topics in International Arbitration in Mexico and Central America*," held on November 9, 2018. Faculty included: Karima Sauma (Young ITA Chair for Mexico and Central America, CICA-AmCham, San José), Alfredo Skinner-Klée Arenales (LatamLex, Guatemala City), Alfredo Skinner-Klée Sol (CENAC, Guatemala City), Lupe López (Freshfields Bruckhaus Deringer, New York), Milton Argueta (Universidad Francisco Marroquín, Guatemala City), Edson López (Integrum, Guatemala City), Ignacio Suárez Anzorena (Clifford Chance, Washington, DC), Michael Fernández (Winston & Strawn, New York) and René Irra (Cuatrecasas, México City).

M. #YoungITATalks, Miami

On November 14, 2018, YoungITATalks, Miami, entitled "*The Changing Landscape of Trade Agreements and Regional Development Strategies and International Arbitration: USMCA, CAFTA-DR, CPEC and the BRI*," was co-sponsored by the Florida International University College of Law and the Miami International Arbitration Society. The program featured a roundtable discussion on the most important trade agreements and regional developing strategies of 2018 and their impact on the field of international arbitration.

Faculty included: Aristeo López (International Trade and Investment, Government of Mexico, Washington, D.C.), Andrea Hulbert (Hulbert Volio Abogados, San José, Costa Rica), Diego B. Gosis (GST, LLP, Miami), Manuel A. Gómez (Professor of Law and

Associate Dean of International and Graduate Studies, FIU College of Law, Miami) and Maria I. Pradilla Picas (Jones Day (Washington, D.C.).

N. *#YoungITATalks, Dubai*

Vinson & Elkins, LLP sponsored #YoungITATalks, Dubai on December 5, 2018, at the Capital Club–DIFC, Dubai. The event included two panel discussions, the first addressing the recent developments in investment arbitration and inter-state arbitration in the Middle East, and the second addressing the future of international arbitration (using the recent Queen Mary International Arbitration Survey as a basis for discussion).

Aditya Singh (Young ITA Asia Chair; White & Case, Singapore) put together the Faculty, which included: Aseel Barghuthi (formerly of Eversheds Sutherland, Amman; now at Herbert Smith Freehills), Emily Beirne, Associate (Vinson & Elkins, Dubai), Sana Belaid (Cisco, Dubai), Charlotte Bijlani (Watson Farley & Williams, Dubai), Dilpreet Dhanoa (Squire Patton Boggs, Dubai), Lara Hammoud (Abu Dhabi National Oil Company, Abu Dhabi), Robert Landicho (Vinson & Elkins, Houston), and Sami Tannous (Freshfields, Dubai).

O. *#YoungITATalks, Paris*

Young ITA and CIARb YMG put together the "*Young ITA Talks and CIArb YMG European Branch Happy Hour*," on December 19, 2018, hosted by Latham & Watkins, Paris.

The program was a 2018 Year-in-Review, marking the hot topics that emerged in the course of the year. Topics discussed included new uses of technology and artificial intelligence, *Achmea* and its possible effects and transparency in arbitrator selection and appointment, as well as publication of awards.

Faculty included: Jil Ahdab (CIArb and Bird & Bird, Paris), Saadia Bhatty (Gide, London), Rocío Digón (Young ITA Continental Europe Chair), Paula Henin (Freshfields, New York), Alexander Leventhal (Quinn Emmanuel, Paris), Ana Gerdau de Borja Mercereau (Derains & Gharavi, Paris), and Diego Romero (Latham & Watkins, Paris).

III. YOUNG ITA WRITING COMPETITION AND AWARD: "NEW VOICES IN INTERNATIONAL ARBITRATION"

The Young ITA Writing Competition and Award "New Voices in International Arbitration" is a unique opportunity for young professionals to contribute actively to the research of international arbitration and to be recognized as qualified voices in this area, as well as to get involved in the activities of the Institute for Transnational Arbitration. The Competition is open to members of Young ITA, practitioners, and students.

The general topic for 2018-2019 Competition and Award was "*Independence and Impartiality in International Arbitration: Arbitrators' Duty to Disclose (and Investigate) Conflicts*." Nevertheless, the papers could address issues related to the topic announced or to any other topic in the field of international commercial or investment arbitration, without restrictions.

The papers were submitted before January 2, 2019 and were judged by two Panels. The First Panel comprised five judges, who selected the best three papers to be submitted to the Second Panel for a final decision. In the 2018-2019 Young ITA Writing Competition and Award, the two Panels were the following; for the First Panel: Silvia Marchili (White & Case, Immediate Past Young ITA Chair); Elizabeth Devaney (Occidental Petroleum Corporation, Young ITA Vice-Chair); Dr. Crina Baltag (University of Bedfordshire, Young ITA Thought Leadership Chair); Robert Landicho (Vinson & Elkins LLP, Young ITA Communications Chair); and Laura Sinisterra (Debevoise and Plimpton LLP, Young ITA Mentorship Program Chair); for the Second Panel: Charles H. Brower II (Wayne State University Law School); Dominique Brown-Berset (Brown & Page); and James Loftis (Vinson & Elkins LLP).

The winner of the 2018-2019 Young ITA Writing Competition and Award "New Voices in International Arbitration" was Damien Charlotin, Ph.D candidate, Cambridge University, with a paper on "A Data Analysis of the Iran-US Claims Tribunal's Jurisprudence – Lessons for International Arbitration Today".

Mr. Charlotin will receive the prize of USD $3,000, selected books published by Wolters Kluwer and up to USD $1,500 reimbursement for expenses to travel to Dallas

to receive the award at the 31st Annual ITA Workshop and Annual Meeting in June. In addition to this, the winning paper will be published in the ITA journal *ITA in Review*.

The Second Panel also awarded three Honorable Mentions to the three runners-up:

1. Kathleen Claussen, Associate Professor, University of Miami School of Law, US, with "*Ethical Forum Shopping in Transnational Arbitration*;"
2. Shervie Maramot, Research Assistant, Monash University, Australia, with "*Keeping Up with Legal Technology—The Impact of the Use of Predictive Justice Tools on an Arbitrator's Impartiality and Independence in International Commercial Arbitration*;" and,
3. Ong Shaw Shiuan, student, National University of Singapore, with "*Dismantling the Safe Harbour: Solving the Evidentiary Problems in Corruption Allegations in Investor-State Arbitration*."

IV. YOUNG ITA MENTORSHIP PROGRAM

As part of its efforts to cultivate young talent in the field of international arbitration, this year Young ITA launched the Young ITA Mentorship Program.

The inaugural cycle of the Mentorship Program will run until October 2019. For this cycle, Young ITA paired successful applicants with a senior Mentor and a "Mentorship Facilitator"—an accomplished arbitration practitioner who can assist Mentees in their activities and serve as a liaison between Mentors and Mentees. Mentors, Facilitators, and Mentees held quarterly meetings, attended workshops and conferences together, discussed career development, explored opportunities for collaboration, and even spoke together at conferences!

Young ITA has received excellent feedback regarding the mentorship program and we look forward to the upcoming 2019- 2020 mentorship cycle, which will be announced in July 2019.

The Program is hands-on, offering students and early career professionals an exceptional opportunity to glean valuable knowledge from seasoned members of the ITA and to forge lifelong connections. The mentee application deadline this year was July 31, 2018.

If you are already a member of Young ITA, please participate and let us know of your interests, suggestions, and concerns. If you are not already a member, please join us now. #YoungITATalks.

Sincerely,

SILVIA MARCHILI is a partner at White & Case Houston office. Silvia M. Marchili focuses on complex international arbitration cases involving investment and commercial claims. She handles international arbitration and litigation matters involving Latin America and Africa, and a variety of sectors, including oil and gas, power, construction, mining, air transportation, and infrastructure. Silvia is bilingual and trained in both civil and common law. With more than 15 years of experience, Silvia represents parties in investment arbitrations before international tribunals under the World Bank's International Centre for the Settlement of Investment Disputes Convention, as well as under other arbitration rules. She is active in several international law and international arbitration organizations, serving as a Member of the FDI Moot Advisory Board, Chair of the Young ITA, and North America regional representative at the ICC Young Arbitrators Forum.

INSTITUTE FOR TRANSNATIONAL ARBITRATION
OF
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

free subscription to ITA's quarterly law journal, World Arbitration and Mediation Review, a free subscription to ITA's quarterly newsletter, News and Notes, and substantial discounts on all ITA educational online, DVD and print publications. Your membership and participation support the activities of one of the world's leading forums on international arbitration today.

C. THE ADVISORY BOARD

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.

Institute for Transnational Arbitration
ITA IN REVIEW

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