P.R.I.M.E. Finance New York Conference 2018
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Arbitration, Mediation and Specialized Rules for Complex Financial Disputes

Moderated by: Robert G. Pickel
Matthew N. Drossos
Hon. Judge Elizabeth S. Stong
John Williams
Panel Summary

- Mediation: A Judge’s Perspective – Hon. Judge Elizabeth Stong
- Arbitration: A Practitioner’s Perspective – Matthew N. Drossos
- Industry Solutions: An Advisor’s Perspective – John Williams
- The Role of P.R.I.M.E. Finance
- Proliferation of Commercial Courts
Mediation: A Judge’s Perspective
Hon. Judge Elizabeth Stong

- The role of mediation in a problem-solving court
- Special issues in a specialized court
- Mediation versus judicial settlement conference
- When does a judicial mediator make sense?
- The role of experts
### Growth of International Arbitration

<table>
<thead>
<tr>
<th>Arbitral Institution</th>
<th>Int’l Cases Registered in 2000</th>
<th>Int’l Cases Registered in 2017</th>
<th>Total Change</th>
<th>Percent Change</th>
</tr>
</thead>
<tbody>
<tr>
<td>ICSID</td>
<td>12</td>
<td>53</td>
<td>41</td>
<td>342%</td>
</tr>
<tr>
<td>ICC</td>
<td>541</td>
<td>810</td>
<td>269</td>
<td>50%</td>
</tr>
<tr>
<td>ICDR</td>
<td>510</td>
<td>1026</td>
<td>516</td>
<td>101%</td>
</tr>
<tr>
<td>Stockholm Chamber</td>
<td>56 (2005)</td>
<td>200</td>
<td>144</td>
<td>257%</td>
</tr>
<tr>
<td>Swiss Chamber</td>
<td>54 (2005)</td>
<td>105 (2015)</td>
<td>51</td>
<td>94%</td>
</tr>
<tr>
<td>London Court of Int’l Arbitration</td>
<td>87</td>
<td>285</td>
<td>198</td>
<td>228%</td>
</tr>
</tbody>
</table>
International Commercial Arbitration

- Private party v. private party (or State acting as a private party)
- Consent to arbitrator’s jurisdiction, usually via an arbitration clause in the contract
- Selection of applicable substantive law
- Selection of procedural law
  - Seat of arbitration
  - Arbitral institutions rules (ICC, LCIA, SCC, SIAC, etc.)
Investor-State Arbitration

- Jurisdiction is often based on offer of consent in treaties (BITs, NAFTA, ECT, etc.)
- Applicable law may involve:
  - Public international law
    - ICSID Convention
    - Bilateral and multilateral investment treaties
  - Private international law
    - To resolve applicable law and conflict of laws issues
  - National law
    - Law of the host State
    - Other legal systems via renvoi
Advantages of International Arbitration


- Party control and flexibility
  - Arbitration is a creature of contract, parties can tailor the process by agreement
- Arbitrator selection: parties can select experts in the field
- Neutral forum
  - No “home court” advantage
- Confidentiality
- Finality and broader enforcement
Disadvantages of International Arbitration

- Consent required, no general jurisdiction
- Non-arbitrable topics
  - Issues of consent
- Arbitral Tribunals’ limited powers
  - to grant preventative measures (no penal sanctions)
  - to compel third-party witnesses
P.R.I.M.E. Finance Arbitration and Mediation Rules

- Current version – February 9, 2016
- Based on the UNCITRAL Arbitration Rules (2010)
- PCA administers cases under the P.R.I.M.E. Rules
- Parties, arbitrators or the appointing authority may also appoint arbitrators not included on P.R.I.M.E. Finance List of Experts
- Tribunal may, at the request of a party or on its own initiative, invite or grant leave to *amicus curiae*
- Articles 38-39 of the P.R.I.M.E. Finance Arbitration Rules provide for the regulation of the currency of the award and interest calculation
- Under Article 40 the arbitral tribunal may, after consulting the parties, take into consideration for any of the parties any tax consequences of the amounts payable under the award
P.R.I.M.E. Finance Arbitration Rules Promote Efficiency

- Institutional support by P.R.I.M.E. Finance as administrator
  - PCA Secretary-General as appointing authority

- Emergency arbitral proceedings (Art. 26a and Annex C)
  - For urgent provisional measures prior to appointment of main arbitral tribunal
  - Available unless excluded (opt-out)

- Expedited proceedings (Art. 2a)
  - Parties may agree shorter time limits

- Referee arbitral proceedings (Art. 26b and Annex D)
  - Fast track procedure for urgent provisional measures
  - Enforceable award under Dutch law within 30-60 days
  - Only available if:
    - Parties have agreed (opt-in) and
    - Place of arbitration is in the Netherlands
Emergency Arbitrator and Interim Measures in International Arbitration

- Gives opportunity to seek emergency / interim measures
- Proliferation among arbitral institutions
  - ICDR; Stockholm Chamber; SIAC; ICC; Hong Kong Center; LCIA; P.R.I.M.E.
- Application for emergency measures (ICC Article 29; Appendix V):
  - Name, description, contact details of the parties
  - Description of circumstances giving rise to application
  - Statement of emergency measure sought
  - Proof of exceptional urgency
  - Proof of payment
- Alternative – seek interim measures from court?
Important Considerations in International Commercial Arbitration

- Impact of *situs* selection / *lex arbitri*
  - Procedural law of the seat as gap-filler?
  - Substantive law of the seat as gap-filler?
  - Interaction with law chosen by parties

- Interplay with national arbitration laws
  - Arbitration-friendly, pro-enforcement jurisdictions (e.g., France, Switzerland, Netherlands, Sweden) – limited and narrowly circumscribed review of awards by domestic courts

- Other important considerations
  - Issue preclusion (*i.e.*, *res judicata* effect of prior arbitral awards) governed by parties’ chosen law v. law of the seat? Or *sui generis* approach - parties’ autonomy and expectation of finality
  - Choice of law – Model Law Art. 28: “Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.”
# Transparency vs. Confidentiality


<table>
<thead>
<tr>
<th></th>
<th>International Commercial Arbitration</th>
<th>Investment Treaty Arbitration</th>
<th>National Court Litigation</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Public Access to Documents</strong></td>
<td>No</td>
<td>Trend toward publication of awards; Access to other documents only under certain treaties</td>
<td>Only in certain jurisdictions, <em>(e.g., US: PACER)</em></td>
</tr>
<tr>
<td><strong>Third-Party Participation</strong></td>
<td>Only joinder &amp; consolidation</td>
<td><em>Amicus curiae</em> under ICSID Arb. Rules &amp; certain investment treaties</td>
<td>Joinder &amp; consolidation; <em>Amicus curiae</em> in certain jurisdictions</td>
</tr>
<tr>
<td><strong>Public Hearings</strong></td>
<td>No</td>
<td>Trend toward public broadcast</td>
<td>Generally Yes</td>
</tr>
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Enforcement

- **Judgments** - under bilateral and regional treaties
  - Otherwise: comity

- **ICSID awards** – obligation to enforce like final judgments
  - ICSID Convention, Art. 54(1)
  - No defenses

- **Non-ICSID awards** - globally under 1958 New York Convention
  - Presumption of enforcement
  - Limited due-process defenses
Annulment vs. Appeal

- **Judgments** – generally full review on appeal
  - Subject to national law

- **Arbitral awards** – no appeal; limited review on fundamental due process grounds
  - **ICSID awards**: self-contained annulment procedure before *ad hoc* committee exclusively under ICSID Convention
  - **Non-ICSID awards**: set-aside by court of country of origin
### Grounds for Annulment Compared

<table>
<thead>
<tr>
<th>ICSID Convention, Art. 52(1)</th>
<th>Power: Annul or not</th>
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</thead>
<tbody>
<tr>
<td>Improper constitution of the tribunal</td>
<td></td>
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<tr>
<td>Manifest excess of powers</td>
<td></td>
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<tr>
<td>Arbitrator corruption</td>
<td></td>
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<tr>
<td>Serious departure from a fundamental rule of procedure</td>
<td></td>
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<tr>
<td>Failure of the award to state the reasons on which it is based</td>
<td></td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>UNCITRAL Model Law, Art. 34(2)</th>
<th>Power: Annul or not</th>
</tr>
</thead>
<tbody>
<tr>
<td>Incapacity of a party</td>
<td></td>
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<tr>
<td>Invalidity of the arbitration agreement</td>
<td></td>
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<tr>
<td>Lack of proper notice</td>
<td></td>
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<tr>
<td>Inability of a party to present its case</td>
<td></td>
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<tr>
<td>Award is extra petita</td>
<td></td>
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<tr>
<td>Improper composition of the tribunal</td>
<td></td>
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<tr>
<td>Improper arbitral procedure</td>
<td></td>
</tr>
<tr>
<td>Lack of arbitrability of the subject-matter</td>
<td></td>
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<tr>
<td>Award in conflict with the national public policy</td>
<td></td>
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</tbody>
</table>
Thank you
Industry Solutions: An Advisor’s Perspective
John Williams

- Special challenges for widely traded instruments:
  - Speed
  - Predictability
  - Transparency

- Special challenge for derivatives:
  - Consistency of application,
    - which gives rise to the need for:
  - Centralization,
    - Which gives rise to issues of:
  - Governance
Industry Solutions: An Advisor’s Perspective

- 2013 ISDA Arbitration Guide
- ICC Rules (Rules of Arbitration of the International Chamber of Commerce)
- LCIA Rules (Arbitration Rules of the London Court of International Arbitration)
- HKIAC Rules (Rules of the Hong Kong International Arbitration Centre)
- SIAC Rules (Arbitration Rules of the Singapore International Arbitration Centre)
- Swiss Rules of International Arbitration
- P.R.I.M.E. Finance Rules
Industry Solutions: An Advisor’s Perspective

- Credit Derivatives Determinations Committee
  - Composed of representatives from 10 dealer banks and 5 buy-side firms
- Advantages
  - Centralized outcomes
  - Rapid decisions
  - Consistent experts (leading to predictable results)
  - Results published same day
  - Reasoning (sometimes) published
- Challenges
  - Conflicts of interest?
  - Not principles-based
Industry Solutions: An Advisor’s Perspective

- Hovnanian transaction
  - Intentional trigger
  - Manufactured discount obligations
- Industry response
  - ISDA and CFTC statements
  - ISDA Working Group on Narrowly Tailored Credit Events
Proliferation of Commercial Courts

- Germany: Chamber of International Commercial Matters of the Regional Court of Frankfurt (*Kammer für internationale Handelssachen bei dem Landgericht Frankfurt am Main*)
- Kazakhstan: Astana International Financial Centre Court (AIF Court)
- France: International Chamber of the Court of Appeal of Paris (*Chambre Internationale De La Cour D’appel De Paris, CICAP*)
- China: The China International Commercial Court (CICC)
- The Netherlands: The Netherlands Commercial Court (NCC)
- Belgium: The Brussels International Business Court (BIBC)
Proliferation of Commercial Courts

Issues to consider:

- Subject matter jurisdiction
- Personal jurisdiction
- Expertise
- Enforceability
Thank you for your attention

Questions?