P.R.I.M.E. Finance New York Conference 2018

White & Case Conference Centre, 1221 Avenue of the Americas,
October 4, 2018

Ethics for Counsel and Arbitrators in Financial Disputes
The ethical considerations that do and may arise

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Chairman P.R.I.M.E. Finance Advisory Board

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Ethics for Counsel and Arbitrators in Financial Disputes:

The context:

- "Ethic": a set of moral principles, especially ones relating to a particular form of conduct.

- "Ethics": those moral principles.

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The unlimited potential of arbitration
Its scope:

- History: the Prophet's acceptance of the role of arbitrator:
  - Abdel Hamid El-Ahdab and Jalal El-Ahdab *Arbitration with the Arab Countries* (3 ed) (Wolters Kluwer 2011) p7
- Geography
- Range of forums: and recognition by 1958 New York Convention, domestic and international courts and tribunals as well as an ever-growing range of arbitral and other institutions;[1] among them in relation to disputes over complex financing transactions is the Hague-based charity P.R.I.M.E. Finance

[1]The City of The Hague has recently announced:
The construction of The Hague Hearing Centre commenced in December 2017. This is an important milestone in our mission to establish the best hearing centre in Western Europe and serve as a platform for international arbitration and mediation.
There are others in Singapore, Hong Kong, Dubai, Abu Dhabi and Qatar. Both France and the Netherlands have both recently opened commercial courts to Anglophones; Lord Woolf has been appointed Chief Justice of such a court in Kazakhstan which with the development of China's $900 billion Silk Road project aspires to become the leading financial centre in Central Asia.

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- Development or even creation by adjudicators of law in order to provide a decision (avoid *non liquet*).

➢ Baragwanath "The interpretative challenges of international adjudication across the common law/civil law divide" *Cambridge Journal of International and Comparative Law* (3): 450,453, 460 (2014)

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- The basis of arbitration is the consent of the parties

- The relationship of arbitration with law and courts:

  - recourse to *lex mercatoria*;

    - Hans van Loon "At the cross-roads of Public and Private International Law", in *The Hague Conference on Private International Law and its Wor*k 11 (Collected Courses of the Xiamen Academy)

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- What Professor Loquin has called the "non-law" of decisions made *ex equo et bono* or as *amiable compositeur*:

➢ *L'Amiable Composition en Droit Compare et International: Contribution à l 'étude du non-droit dans l'arbitrage commercial* Eric Loquin (Libraires Techniques Paris 1980)

➢ *A's Co Ltd v Dagger* HC Auckland M1482-SD00, 7 March 2003 at [145]: the parties' choice was said to "connote an application of principles of natural justice and fairness rather than some narrow legalistic approach that could reasonably be regarded as unfair."

➢ the '*compromis*' between Croatia and Slovenia in the PCA-administered case between those two countries: PCA CASE NO. 2012-04 Final Award 29 June 2017 https://pcacases.com/web/view/3

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- Art. 4 of the Arbitration Agreement contained the following mandate for the tribunal: to apply

  (a) the rules and principles of international law and

  (b) (in respect of a particular aspect of the dispute) international law, equity and the principle of good neighbourly relations in order to achieve a fair and just result by taking into account all relevant circumstances

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- **Ethics in law creation can include international law**:

  - *North Sea Continental Shelf Cases* 1969 ICJ Reports 4 at 47:

> On **a foundation of very general precepts of justice and good faith**, actual rules of law are here involved which govern the delimitation of adjacent continent shelves-that is to say, rules binding upon States for all delimitations; in short, it is not a question of applying equity simply as a matter of abstract justice, but of **applying a rule of law which itself requires the application of equitable principles**, in accordance with the ideas which have always underlain the development of the legal régime of the continental shelf in this field, namely:
>
> (a) the parties are under an obligation to enter into negotiations with a view to arriving at an agreement ...
>
> (b) **the parties are under an obligation to act in such a way that, in the particular case, and taking all the circumstances into account, equitable principles are applied** ...

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- *Asian Agricultural Products Limited v Sri Lanka* ICSID Case No. ARB/87/3, Final Award 27 June 1990;

- Meg Kinnear and Francisco Grob "*Asian Agricultural Products Limited v Sri Lanka*": Twenty-Five Years later" in Ulf Franke & ors *Arbitrating for Peace: How Arbitration Made a Difference* (Wolters Kluwer 2016) pp 203-4

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- **Differences of institutional opinion as to ethical test**:

➢ *Halliburton Company v Chubb Bermuda Insurance Ltd* [2019] EWCA Civ 817, [2018] 1WLR 3361, [2018] Lloyd's Rep IR 402 paras 67-8 – common law of England less exacting than IBA, ICC and LCIA criteria

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- **Deeper-seated differences of State opinion illustrated by**:

➢ the now defunct Transpacific Partnership Agreement of 4 February 2016 (TPP):

and

➢ the contemplated Transatlantic Trade and Investment Partnership (TTIP):

now on the back burner

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- For the TPP (Pacific) the parties agreed on the use of arbitration

- The TTIP (Atlantic) negotiations saw deep-seated difference between the US, which to date has sought use of arbitration to resolve disputes, and European interests favoring a set panel of judges.

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Compatibility of litigation and arbitration:

- search for *forum conveniens* may lead to either or both:
  - Campbell McLachlan *Lis Pendens in International Litigation* Martinus Nijhoff Publishers 2009
  - *Credit Suisse International v Stichting Vestia Groep* [2014] EWHC 3103 (Comm), [2015] Bus LR D5
- Community of judicial/arbitral personnel, as in the Chagos Islands case:
  - *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2008] UKHL 61, [2009] 1 AC 453
  - *Republic of Mauritius v The United Kingdom* Award 18 March 2015 http://www.pcacases.com/pcadocs/MU-UK%2020150318%20Award.pdf, (arbitral panel included ICJ judge)
  - International Court of Justice – following argument, now awaiting advisory opinion

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- In each forum need for a generic ethic for counsel and the decision-maker – arbitrator or judge (overarching the important detail of specific kinds of ethical obligations, such as the rules of natural justice: absence of bias and giving fair opportunity to meet adverse argument).

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Since an arbitrator is a judge, although of a very special kind, the judicial paradigm.

Classic formulations:

- in France:
  In truth, we can deliver justice only with trembling hands[2]

- in The Netherlands:
  The qualities required of a judge are prudence and courage[3]

[2] Guy Canivet, *Audience solennelle du 6 janvier 2006 – Discours de Guy Canivet, Premier président de la Cour de cassation* (Paris, 8 January 2006) http://www.courdecassation.fr/IMG/File/pdf_2006/audience_solennelle_2006_discours_pp.pdf "Il est vrai que nous ne rendons justice que les mains tremblantes"
[3] Gert Corstens 31 October 2014 on retiring as Chief Justice "La prudence et l'audace"

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The judicial oaths:

- for US Federal judges

> I, ___, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as ___under the Constitution and laws of the United States; and that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. SO HELP ME GOD. [4]

[4] Title 28, Sec. 453 and Title 5, Sec. 16, United States code

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- For New York State judges

  I do solemnly swear (or affirm) that I will support the constitution of the United States, and the constitution of the State of New York, and that I will faithfully discharge the duties of the office of ___ according to the best of my ability;"[5]

- In the United Kingdom

  I promise [1] to **do right to all manner of people** [2] after **the laws** and **usages of the realm** [3] without fear or favour, affection or illwill. (Promissory Oaths Act 1868)[6] (numbers in parenthesis added)

➢ See *Lehman Brothers International (Europe) v AG Financial Products Inc* Supreme Court of the State of New York Index No. 653284/2011 per Judge Marcy S. Freeman July 2, 2018, pp21 fn 10 and 25 fn 11 and 28.

[5] The *Constitution* of the State of New York Article XIII
[6] 1868 (UK) adopted or adapted widely within States of the common law

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- Albert Einstein:

  > Imagination is more important than knowledge. For knowledge is limited to all we now know and understand, while imagination embraces the entire world, and all there ever will be to know and understand.[7]

- But ethics is an inevitable element of all evolution.

[7] 1929 October 26, *The Saturday Evening Post*, "What Life Means to Einstein: An Interview by George Sylvester Viereck", Start Page 17, Quote Page 117, Column 1, Saturday Evening Post Society, Indianapolis, Indiana.

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- President Abdulqawi Yusuf of the International Court of Justice:

> *Hominum causa omne jus constitutum est*, **all law is created for the benefit of human beings**[8]...
>
> Happily,...there are **some international lawyers** who ... **recognise** the **ephemeral nature of legal rules**. They recognise that **the rules** exist only **because and for the benefit of the society that they serve**. They recognise that **rules evolve, grow, fall into desuetude** because of the changing needs of society. Most importantly, they recognise that **it is their job to identify, propose, and effect these changes in practice**.... **theory and practice** are to a certain extent indissoluble: **they are simply two manifestations of our personality**.[9]

[8] Used by President Antonio Cassese ICTY Appeals Chamber, *Prosecutor v Tadic, Decision on the Defence Motions for Interlocutory Appeal on Jurisdiction*, para 97.

[9] Address in honour of Antonio Cassese, Florence 2017. It is paralleled in respect of procedure by Jeffrey Golden's "Call for Innovation" in *International Financial Disputes: Arbitration and Mediation* (ed Jeffrey Golden and Carolyn Lamm) (Oxford 2015) 365.

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The judicial ethic

- Extensive discussions of particular ethics of international judges,[10] arbitrators[11] and counsel.[12]

➢ *The Backlash against Investment Arbitration: Perceptions and Reality*:[13]

- "trend toward cross-pollination of ethical standards in international arbitration".[14]

[10] See for example Andrew L Kaufman "Judicial Ethics: The Less-Often Asked Questions"64 Wash. L. Rev. 851 (1989)

[11] Anjaa Seibert-Fohr "International Judicial Ethics" in *The Oxford Handbook of International Arbitration* (ed Cesare PR Romano & ors 2014) p757;

[12] Gary B Born *International Commercial Arbitration* Volume II (Wolters Kluwer 2009) 2304 "Professional Conduct of Legal Representatives in International Commercial Arbitration"; Gary B Born *International Arbitration: Law and Practice* (Wolters Kluwer 2012) 265; Robert W Wacher "Ethical Standards in International Arbitration: Considering Solutions to Level the Playing Field" 24 Geo. J. Legal ethics 1143 (2011); Margaret L Moses "Ethics in International Arbitration: Traps for the Unwary"10 Loy. U. Chi. Int'l L Rev 73 (2012)

[13] (ed Michael Walbel & ors Wolters Kluwer 2010)

[14] P210

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- A variety of proposals for such codes for arbitrators:
  - Catherine A Rogers *Ethics in International Arbitration* (Oxford 2014);
  - *Halliburton Company v Chubb Bermuda Insurance Ltd* (2018) slide 10 supra

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- Jan Paulsson "The *Alabama* Claims Arbitration" in *Arbitrating for Peace*[15] advises that **commercial disputes are suitable for arbitration**, since:

  the **paramount interest is to promote the international exchanges that are necessary to sustain the world's growing population**: to **encourage trade in the framework of the rule of law**, and thus to **avoid the debilitating transaction costs** that **arise in an environment of legal insecurity**[16]

[15] (Ed Ulf Franke & ors Wolters Kluwer 2016)
[16] P21

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Fundamental change of ethic over time:

- In ***the Alabama case*** to avoid war between the USA and Great Britain[17] the arbitral process was:

  manipulated by the protagonists to suit their purposes.[18]

- Its context was the former Grotian principle that a State may legitimately resort to war to give effect to its policies[19]
- the Kellogg-Briand Treaty 1928[19]
- the Charter of the United Nations

[17] Mark Mazower *Governing the World – The History of an Idea* The Penguin Press (USA) 2012 86
[18] n 15
[19] Oona A. Hathaway and Scott J. Shapiro *The Internationalists and their Plan to Outlaw War* (Allen Lane 2017)

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- Compare the pioneer Bilateral Investment Treaty claim ***Asian Agricultural Products Limited v Sri Lanka*** (1990)[20] described[21] as a:

  '**path-breaking dispute**', giving rise to a '**silent revolution**' **that continues today**... this **award demonstrates how the ICSID institutional framework can contribute to interstate peace through the resolution of investment disputes, even in complex geopolitical contexts**.

- Hon Charles Brower and Sadie Blanchard: "What's in a meme? The Truth about Investor-State Arbitration: Why it Need Not, and Must Not, Be Repossessed by States" 52 Columbia Journal of Transnational Law 689

  Why resistance to arbitration (as by Europeans over Atlantic Trade Treaty (TTIP)?

[20] ICSID Case No. ARB/87/3, Final Award 27 June 1990
[21] In *Arbitrating for Peace* (n 15) chapter by Meg Kinnear and Francisco Grob "*Asian Agricultural Products Limited v Sri Lanka*": Twenty-Five Years later" n25 at p191-2

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1) **History**
   - o the **1899 Convention** for the Pacific Settlement of International Disputes that **created the Permanent Court of Arbitration**;
   - o the **First World War**; in **1922** the **Permanent Court of International Justice**
   - o the **Second World War**; in **1945** the **International Court of Justice**
   - o **1976** the **PCA adopts the UNCITRAL Rules**

2) **public health**:
   - o **tobacco;**
   - o **ozone layer;**
   - o **Nuclear;**
   - o **The biggest of all, global warming**

- **All with financial implications**

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Tobacco

- *Economist* essay of 11 October 2014:

> If you wanted to convince the public that international trade agreements are a way to let the **multinational companies get rich at the expense of ordinary people**, this is what you would do: give **foreign firms a special right to apply** to a **secretive tribunal of highly paid lawyers** for **compensation whenever** a **government passes a law** to, say, **discourage smoking**, **protect the environment** or **prevent a nuclear catastrophe**. Yet that is precisely **what thousands of trade treaties over the past half century have done**, through a process known as "**investor-state dispute settlement**", or **ISDS**".[22]

- **Dissenting judgment** in the **High Court of Australia** in the Tobacco Plain Packaging case *JT International SA v Commonwealth of Australia* (2012)[23] which contended:

> 242 … **there should have been an order declaring that the Tobacco Plain Packaging Act 2011 (Cth) is invalid**

[22] p74 cited by Hugo Hans Siblesz, Secretary-General of the Permanent Court of Arbitration at the Carnegie Seminar of 27 January 2016

[23] 250 CLR 1

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- *Philip Morris vs Australia* UNCITRAL, PCA Case No. 2012-12:

  Claim dismissed on procedural grounds.[24]

- *The Queen on the Relation of British American Tobacco UK Limited and others v Secretary of State for Health* [2016] EWCA Civ 1182, [2018] QB 149

[24] Award 17 December 2015 para 585

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Ozone Layer

Discovery that use of chlorofluorocarbons had gravely damaged the ozone layer: the **Montreal Protocol on Substances that Deplete the Ozone Layer,** a protocol to the Vienna Convention for the Protection of the Ozone Layer and **in force 26 January 1989**, since revised, **ratified by 197 parties including 196 states and the European Union**, the first **universally ratified treaties** in **United Nations history**.

Nuclear

- **Judgment** of the First Senate of the **Federal Constitutional Court of Germany 6 December 2011**
- ***Vattenfall AB and others v. Federal Republic of Germany*** (ICSID Case No. ARB/12/12) **award pending**

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Global Warming

Iron Rhine Award – changing ethic

- *Reports of International Arbitral Awards* Award in the Arbitration regarding the Iron Rhine ("IJzeren Rijn") Railway between the Kingdom of Belgium and the Kingdom of the Netherlands, decision of 24 May 2005 Volume XXVII pp 35-125

  Where issues of:

  human health and safety

  are at stake

  new norms have to be taken into consideration; and ... new standards given proper weight.[25]

[25] paras 58-9

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The Precautionary Principle

- **Lord Carnwath** at **London** *Conference on Small States and the Environment* **6 September 2018** considered **investor-state** arbitral **tribunals might be appropriate to develop standards regarding scientific proof in the international sphere**

International Law

- **Anthea Roberts *Is International Law International?*** [26]
- ***Banco Santander Totta SA v Companhia de Carris de Ferro de Lisboa SA*** [2016] EWHC 465 (Comm), [2016] 4 WLR 49 per **Blair J**;
- ***The Law Debenture Trust Corporation P.L.C. v Ukraine*** [2017] EWHC 655 (Comm), [2017] QB 1247 per **Blair J**;
- **Court of Appeal 14 September 2018** [2018] EWCA Civ 2026

[26] (Oxford 2017)

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Conclusion:

- **Professor John Westlake essay on international arbitration, published in *International Journal of Ethics*, October 1896**:[27]

> … **international arbitration is in the air**. When this happens to an idea, and as long as it continues to be the case, **the power** of **the idea for good cause cannot be measured by logic, necessary as that is** that we should do our best to understand the conditions in order to work with them. **It is the season to raise our hopes, and do our utmost to try what the idea of international arbitration can accomplish.**

[27] 1 at 20