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The In's and Out's of International Commercial Arbitration

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The In's and Out's of International Commercial Arbitration

June 23, 2020

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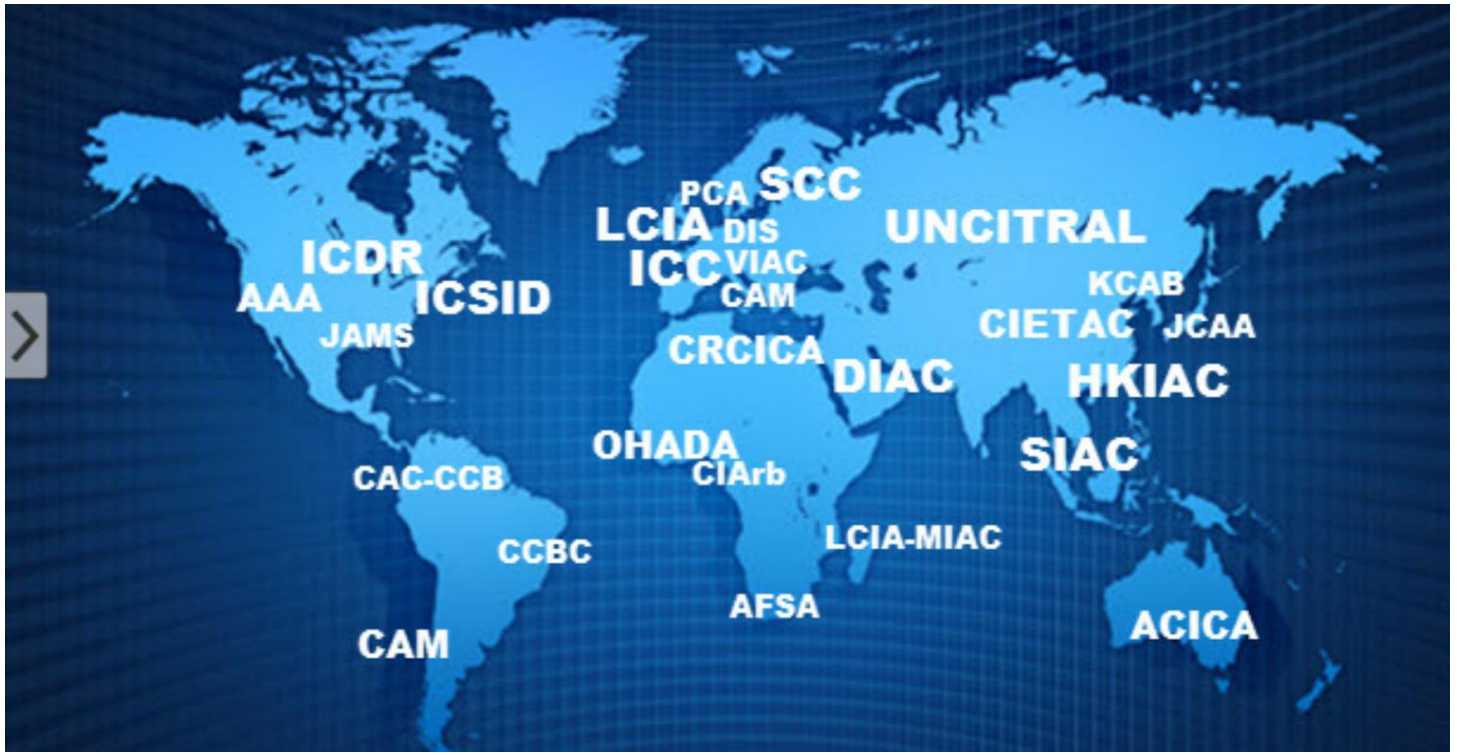


What is International Arbitration ?

The Basics

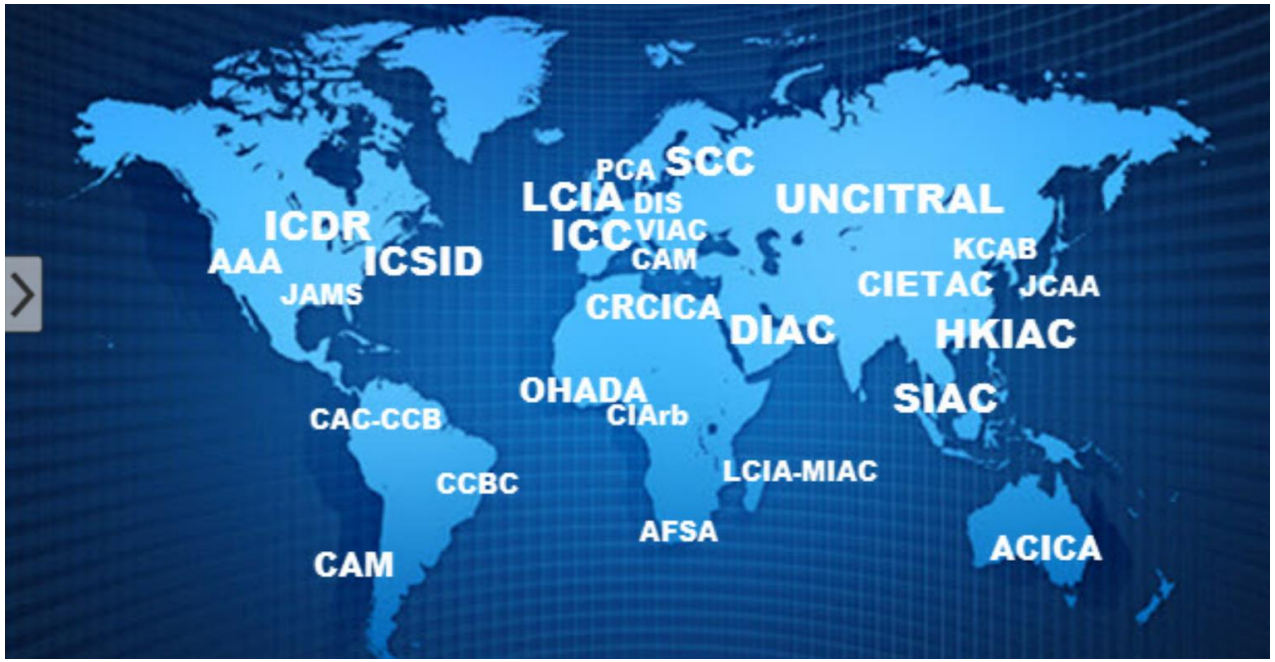
- One of the oldest forms of international dispute resolution.
- Involves one or more arbitrators reviewing the dispute, hearing the relevant evidence, interpreting the applicable law, and issuing a final and binding decision.
- Creature of consent.

Types of International Arbitration

- Inter-State Arbitration
- Investment Arbitration
- Commercial Arbitration
- Investment arbitration and commercial arbitration are not mutually exclusive!

(Perceived) Benefits of International Arbitration

- **Simplicity** - Parties can effectively "forum shop"



(Perceived) Benefits of International Arbitration

- **Privacy**
- **Self-selected adjudicators** - Parties can agree a mechanism for arbitrator selection.
- **The overall process is a reflection of the parties' preferences and autonomy** - Parties can choose the location of the proceedings (the "seat" which will determine the "procedural" law applicable to these arbitrations) and also the law applicable to the substance of their claims. They can be, and usually are, different!

(Perceived) Benefits of International Arbitration

- **Speed**
  - Party-driven, can be quicker. No appellate procedure!
- **Expense**
  - Cases in national courts can go on for years, especially with appellate procedures. Arbitrations can take less time, which usually means they are less expensive.

Partnership between Arbitral Tribunals and National Courts

- **Supporting Role**
  - Provide the default procedural rules (but arbitrators are not bound to use them if not mandatory, again, party autonomy!)
  - Discovery in aid of arbitration
  - Injunctions in aid of arbitration
  - The courts of the "seat" have special powers (e.g., oversee challenges to arbitrators).
  - Enforcement proceedings (in the case of the New York Convention, this role is played by a court in any member country where the winning party may wish to collect on its award).

Partnership between Arbitral Tribunals and National Courts

- **Supervising Role**
  - Ensures that disputes that have been agreed to be arbitrated are not litigated (e.g., determine validity of arbitration agreements, stay an inappropriate arbitration, compel parties to arbitrate).
  - Courts of the "seat" oversee annulment proceedings (no substantive appeal process, but the award must comply with the law of the country where it was rendered).

The New York Convention (1958)

163 countries worldwide are parties.

The New York Convention (1958)

- Agree to recognize agreements to arbitrate (Article II).
- Agree that when international arbitral decision are rendered in a different member state, they can be enforced in another member state (Article I).
- The enforcement process gives the arbitral decision the same weight as it had been issued by a court of that country (Articles III & IV).
- Also agree to an annulment process – enforcement of an award may be refused (Article V).

Objectives of the New York Convention

- The NY Convention has two objectives:
  - The recognition and enforcement of arbitral ***agreements***
  - The recognition and enforcement of arbitral ***awards***

Article II(1): "Each Contracting State shall *recognize* an **agreement** in writing which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration."

Article III: "Each Contracting State shall *recognize* **arbitral awards** as binding and *enforce* them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles."

United Nations
UNCITRAL

The New York Convention is a Treaty

- The Convention is an international treaty and thus part of public international law.
- Engages the responsibility of Contracting States on the international plane.
- Interpreted according to the Vienna Convention on the Law of Treaties.
  - Articles 31 and 32 provide rules of interpretation.
  - Furthers goal of uniform interpretation.

United Nations
UNCITRAL

The Federal Arbitration Act

- A provision of the United States Code (U.S.C.).
- An act of Congress that implements the New York Convention.
- Provides a mechanism for U.S. courts to interact with international commercial arbitration awards.
- It applies in both state courts and federal courts.
- States cannot pass laws inconsistent with the FAA mandate to broadly enforce agreements to arbitrate.
- Courts have limited grounds to vacate or modify arbitration awards.

Lifecycle of an International Arbitration Proceeding

- Claimant files a Request For Arbitration ("complaint")
  - Including at least a summary of its claim
- Respondent's Answer
  - Including counterclaims
- Claimant's Reply
  - Answering on the counterclaims, if any

Lifecycle of an International Arbitration Proceeding

- Appointment of the tribunal
  - Including confirmation
- Procedural hearing
  - Setting the steps and timetable
- Claimant's Statement of Claim
  - Including all documentary and testimonial evidence on which the claim is based
- Respondent's Statement of Defence and Counterclaim
  - Including all documentary and testimonial evidence on which the defense is based
- Document disclosure
  - Often based on the IBA Rules

Lifecycle of an International Arbitration Proceeding

- Claimant's Reply
  - Answering the SoD and updating the claim in light of disclosure
- Respondent's Rejoinder
  - Updating its defense
- Exchange of pre-hearing submissions

Lifecycle of an International Arbitration Proceeding

- Hearing
  - Including cross-examination of witnesses and experts
  - Length set by tribunal and parties based on the number of witnesses and experts and complexity of legal issues
  - Begins with opening statements, concludes with closing statements
  - Rarely have oral direct testimony
- Post hearing submissions
- Award
- Annulment and/or enforcement proceedings in an appropriate jurisdiction's courts

Thank you!

- **Questions?**
- **Keep in touch!**
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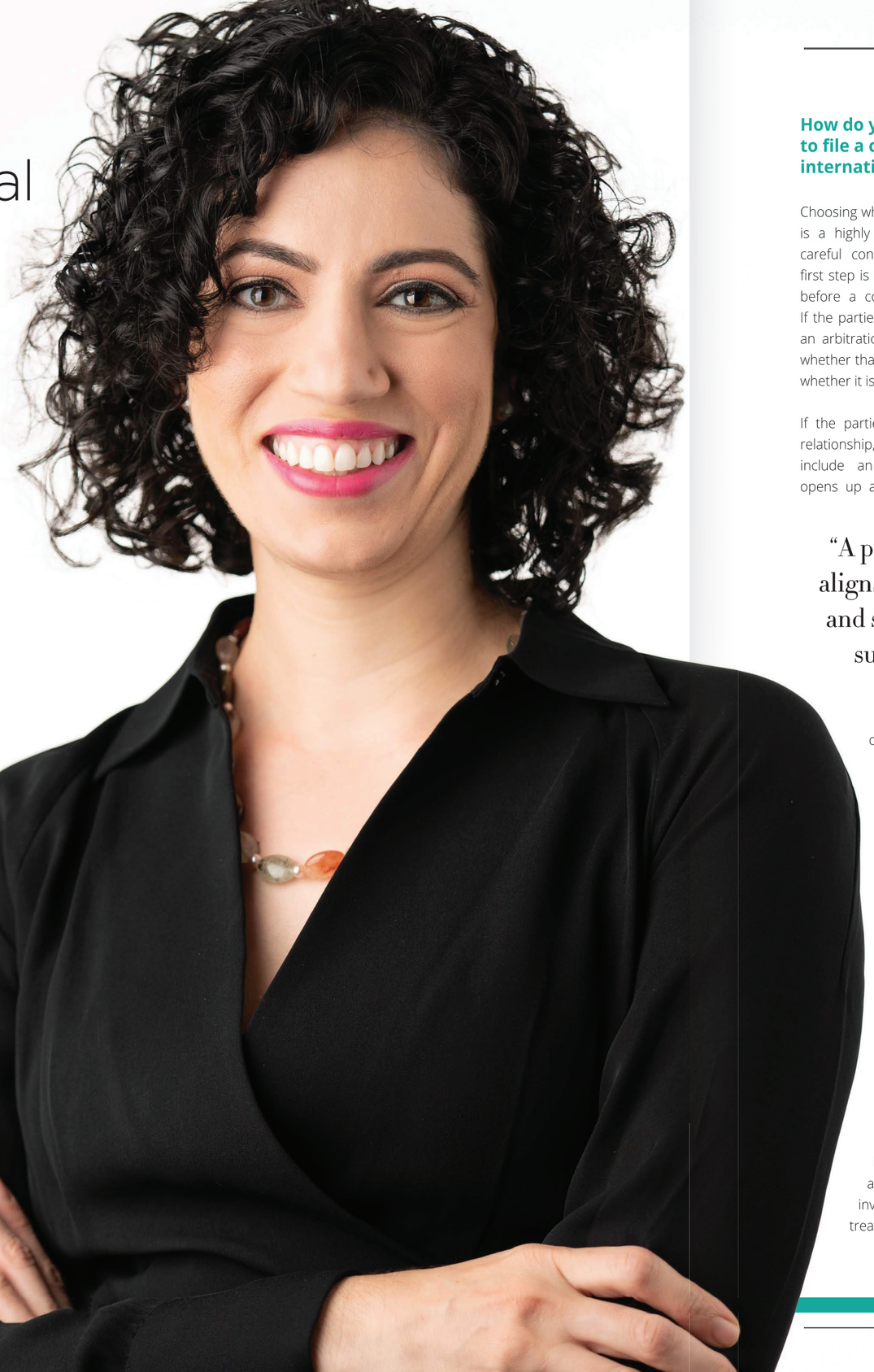
How Does International Arbitration Work?

Speaking to Kiran Nasir Gore, we try to answer questions that companies trading all over the globe may be asking themselves. From, 'Which jurisdiction will my dispute fall under?', to 'Is it easier to opt for traditional litigation?', Kiran succinctly briefs us on the process behind international disputes, honing in on foreign laws, and the advantages of opting for arbitration over litigation.



How do you decide where to file a case arising from an international dispute?

Choosing where and how to pursue a claim is a highly specific inquiry that requires careful consideration. Often times, the first step is figuring out if the case belongs before a commercial arbitration tribunal. If the parties have a contract that includes an arbitration agreement, then we assess whether that clause covers the dispute and whether it is binding.

If the parties do not have a contractual relationship, or their contract does not include an arbitration agreement, this opens up a number of possibilities. We often first assess whether there is a jurisdictional nexus between the dispute and the United States. If that nexus exists, we can pursue appropriate claims in US courts. Otherwise, we have great connections abroad and we draw upon our trusted relationships with other lawyers and law firms to pursue litigation in other more appropriate jurisdictions.

Finally, we always consider whether a dispute involves violation of a bilateral or multilateral investment treaty. Our clients often invest in foreign jurisdictions and it is quite possible that their investment might benefit from treaty protection. Where this is the case, investment arbitration can be an effective forum for asserting claims and damages caused by improper State action.

None of these options are mutually exclusive and it may be appropriate to pursue more than one approach at the same time.

What are some of the benefits of resolving a dispute through international arbitration rather than traditional litigation?

Many parties include arbitration agreements in their international contracts because they wish to confidentially and efficiently resolve disputes that may arise out of that contract.

> "A party should make an informed decision that aligns with its anticipated dispute resolution style and strategy to ensure that there are no unhappy surprises later on when a dispute does arise."

Among the several other advantages of arbitration over traditional litigation are:

- ***Autonomy.*** Arbitration provides autonomy for parties to tailor the dispute resolution process for their mutual benefit. Parties may select the forum, tribunal, language and procedure governing the arbitration. The parties' ability to choose the composition of their tribunal ensures that the dispute will be heard by individuals that the parties trust and consider competent. This greater level of confidence in the dispute resolution process supports its success, especially when the parties come from different parts of the world with different legal systems.

- ***Confidentiality.*** As mentioned, a major benefit to international arbitration is the ability to maintain confidentiality of a dispute, its related documents and submissions, as well as its resolution. Unlike public court proceedings, parties need only agree to confidentiality in the arbitration clause to effect this intent. However, public companies may have filing requirements obligating them to disclose the existence of arbitration, as well as its outcome. Moreover, the final award may be publicly disclosed if the winning party chooses to enforce it in court, as described below.

- ***Limited discovery.*** International arbitration may permit the parties to limit the breadth and scope of documents and information that they are required to disclose in the proceedings. In contrast, US-style litigation requires very broad document disclosure. The degree of discovery in international arbitration, however, will ultimately depend on the legal background of the tribunal and the parties' counsel. Common law lawyers unfamiliar with international arbitration are likely to impose the broad discovery rules they are comfortable with, thus negating the benefit of limited discovery in international arbitration. A party seeking to limit the number of documents it wishes to disclose, or compel the disclosure of, should choose experienced international arbitration counsel and tribunal members who share this perspective.

- ***Flexibility.*** Litigation before courts is governed by local rules of procedure and evidence. As any litigant knows, these rules are intricate and navigating them can be frustrating and time-consuming. In contrast, parties to international arbitration are free to fashion the arbitral process to suit their needs and preferences. While certain general legal requirements will be standard, the parties may select the procedural and evidentiary rules governing their dispute.

- ***Enforcement.*** Parties who receive favourable international arbitration awards may enforce those awards internationally through the United Nations' New York Convention, to which 161 countries are a party. The Convention requires the courts of party states to give effect to arbitration agreements and recognise and enforce international arbitration awards rendered in other party states, save for some

narrow exceptions. This allows for a more streamlined enforcement process compared to the enforcement of foreign judgments as there is no similar uniform enforcement mechanism for those judgments.

There are dozens of international arbitration institutions located around the world, each marketing its defining features. Does it really matter which one is selected in an arbitration agreement?

Thoughtful contract negotiators often seek guidance from experienced international arbitration counsel before selecting an arbitration institution for inclusion in an arbitration agreement because this truly is an important decision. Parties remain free to take an à la carte or ad hoc approach, but generally, selecting an arbitration institution to administer an arbitration means that the institution's procedural rules will also guide dispute resolution.

These procedural rules are key to the efficient and effective resolution of the dispute. Just to provide a few key examples: At the beginning, the rules explain how to initiate a claim and how to appoint the tribunal. Throughout, the rules guide the timetable of the arbitration and how the parties may present their case and make submissions to the tribunal. Finally, the rules provide the timetable for issuing an arbitral award. Perhaps most importantly, the rules often set out the costs and fees associated with the arbitration.

A party should make an informed decision that aligns with its anticipated dispute resolution style and strategy to ensure that there are no unhappy surprises later on when a dispute does arise.

Do you only work on international disputes involving the application of US law? How do you navigate cases where foreign law might apply?

As a New York-trained litigator, I am most at home working on disputes involving US law, but the legal challenges involved in international disputes drew me into specialising in this field. In international commercial arbitration, the governing law is selected by the parties while negotiating the contract. Similarly, even if a case is litigated in US court, it is possible that foreign law might apply. As a result, I have worked on commercial disputes involving the laws of a variety of jurisdictions, ranging from Ghana and Venezuela to France and Brazil. I enjoy learning about other legal systems and collaborating with local law experts. I always feel enriched, rather than hindered, by my US legal education. It helps me take a comparative approach and identify similarities and differences among divergent legal systems and I can efficiently parse through and challenge the legal arguments presented by both sides to a dispute.

> "I enjoy learning about other legal systems and collaborating with local law experts. I always feel enriched, rather than hindered, by my US legal education."

Does politics or international policy ever play a role in international dispute resolution?

International business disputes are often found at the intersection of international trade, commerce, and development and they are not immune to changes in policy. A great example is provided by the track record of the Trump Administration over the past few years. In at least three areas, President Trump's "America First" approach to foreign policy has significantly impacted the ways in which international business disputes arise and may be resolved, such as:

- The Trump Administration has taken a unilateral approach toward sanctions, which creates divergence in both the timing and substance of global sanctions measures. After US withdrawal from the Joint Comprehensive Plan of Action (JCPOA), businesses that must comply with both US and EU law must navigate inconsistent economic sanctions and the risks accompanying imperfect compliance.

- At the World Trade Organization (WTO), the Trump Administration recently caused the suspension of the WTO's Appellate Body, the second-level review mechanism of the Dispute Settlement Body, by blocking the appointment of any new Appellate Body members. International investors and global businesses do not directly engage in dispute resolution at the WTO, but they are highly sensitive to politicised fluctuations and the impact of trade wars.

- The Trump Administration is also responsible for launching renegotiation of North American Free Trade Agreement (NAFTA), the trade deal that enabled a free trade zone among North American economies for twenty-five years. NAFTA's successor, the US-Mexico-Canada Agreement (USMCA), not only rebalances trading rights, but it directly impacts the rights of prospective investors. The USMCA's Chapter 14 introduces a new approach to investor state dispute settlement, which is less balanced than the version found in NAFTA's Chapter 11. It also requires prospective claimants to abide by greater procedural requirements before having any ability to file an investment arbitration claim. Each of these developments is a direct result of the Trump Adminsitration's foreign policy agenda. At the same time, each carries tangible commercial impact and will likely lead to increased international litigation or arbitration among commercial parties who either face increased compliance risks, or find themselves in business disputes because their pre-existing deals are either no longer viable or no longer as fruitful.

When advocating in an international dispute what tools best support your efforts?

Over time, I have learned that the best advocacy involves telling a really great story. It is important to learn to use words effectively and accurately. A good story, especially one steeped with nuance and detail, must be clear and compelling. The story also must be tailored to its audience, with room for adaptation and improvisation in case the unexpected comes up, or queries that derail the storytelling process. In order to tell this kind of story effectively, it is important to know the story inside and out. I always aim to question and resolve concerns about every fact and document before an opposing counsel, judge, or arbitrator has the chance to do so. The goal is to never be caught off guard and be so well-informed that I can manage even if left surprised.

A related element involves simply having better information than the other side. Our Firm's creed is "whoever has the best information wins." We oftentimes work with top former intelligence officers from numerous international and domestic agencies to obtain highly confidential information essential not only to obtain, but also to collect, favourable judgments and arbitral awards.

Finally, without a doubt, international advocacy is challenging work. In order to succeed it is important to always maintain good humour, respect (for both the process and others), and above all, humanity.

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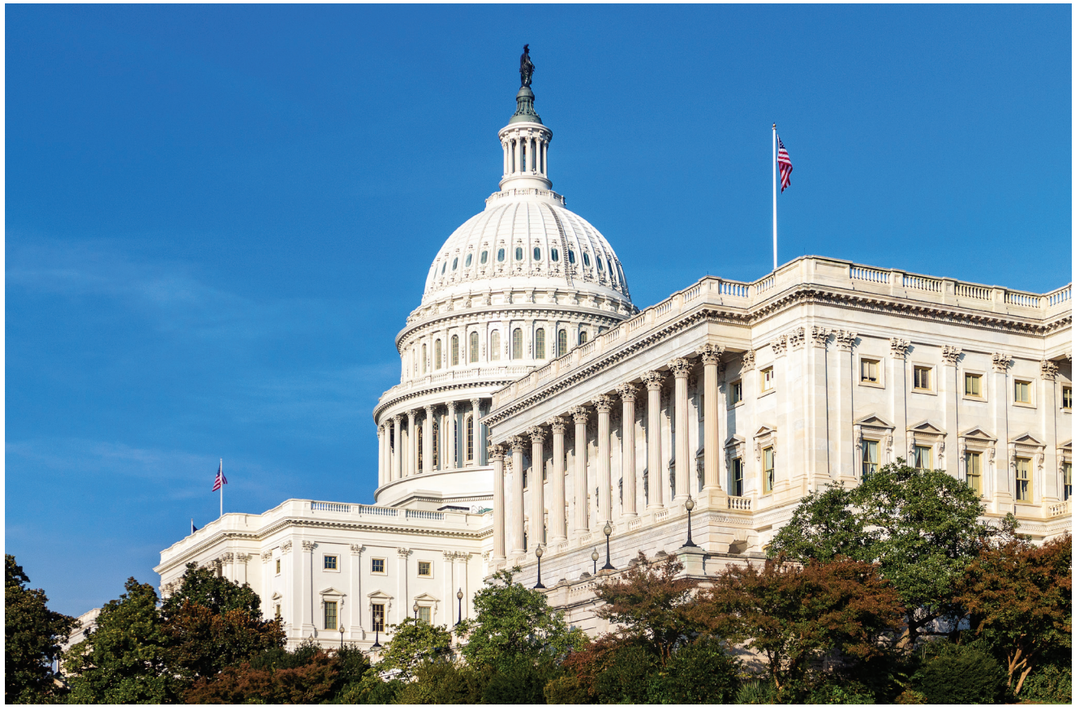

In your opinion, what is a key "hot" topic in international dispute resolution practice today?

I have already described why I think "information" can be the most powerful tool in international advocacy. This same idea is currently at the centre of a hot debate in international dispute resolution practice. In the US, 28 U.S.C. Section 1782 is a statutory provision which permits a US federal district court to order testimony or produce documents in aid of a proceeding before a "foreign or international tribunal." There is currently a deeply entrenched circuit split over the interpretation of the quoted language. Specifically, whether an international commercial arbitration qualifies, given that it is a private (and not public) tribunal.

To briefly summarise: During 2019 alone, a New York federal district court judge allowed such discovery in aid of an LCIA arbitration, but another New York federal district court judge declined such discovery in aid of a CIETAC arbitration; the federal district court in the District of Columbia denied a request for production of documents, while allowing a request for written answers by way of interrogatories in aid of an ICSID investment arbitration, and the Sixth Circuit allowed discovery in aid of a DIFC-LCIA arbitration.

Guidance of the US Supreme Court is not only welcome, but necessary. In particular given the interaction of the US approach, which very much focuses on providing access to information, with more global views of disclosure and privacy, including the French blocking statute and GDPR compliance.

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About Kiran Nasir Gore, Counsel and Law Offices of Charles H. Camp, P.C.

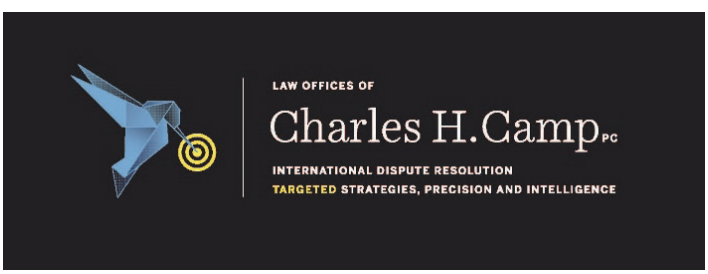
I focus my practice on international dispute resolution and serve as Counsel in The Law Offices of Charles H. Camp, PC in Washington, DC. At the Firm, we build upon Charles' more than 35 years of legal expertise representing clients from around the world to solve complex international disputes through international litigation, arbitration, and debt recovery.

I came to the Firm following nearly a decade of practice with global law firms in New York and Washington, DC. I started as a litigator in the New York City office of DLA Piper LLP, where I represented foreign and domestic clients in diverse disputes before US courts and international tribunals. Even in those early days, my cases consistently involved some international element and I enjoyed their unpredictability and complexity.

After several years, I transitioned my practice to focus exclusively on international commercial and investment arbitration and joined the Washington, DC office of Three Crowns LLP when the firm first launched. Three Crowns set out to become the first global firm specialised in international arbitration and I was inspired by the firm's innovative approach. I learned from and worked alongside some of the world's leading advocates on high-profile and high-value international arbitrations. As I matured in my practice, I became more responsive to and attuned with client needs. I wanted to provide more personalised and interdisciplinary solutions to my clients' legal disputes, with the ultimate goal of helping them manage risks and gain commercial success.

I began working with Charles at his Firm last year and am lucky to have found a kindred spirit. We are both comfortable advocating in courts and before international tribunals and we work together to devise effective and creative solutions to our clients' international disputes.

Alongside my legal practice, I am active in both academic and scholarly activities. I am an adjunct professor at The George Washington University Law School, where I primarily teach foreign-trained lawyers. I also am a part-time lecturer at New York University's Global Study Center in Washington, D.C. I serve as Associate Editor of ICSID Review – Foreign Investment Law Journal and Associate Editor of the Kluwer Arbitration Blog. Each of these roles supports my practice by immersing me in emerging ideas and challenging my skills and expertise.



2019 In Review: Noteworthy Developments in the United States

Kluwer Arbitration Blog
February 5, 2020

Giorgio Sassine (Assistant Editor for Canada and the United States) (Severson & Werson) and Kiran Nasir Gore (Associate Editor) (The George Washington University Law School; Law Offices of Charles H. Camp)

Please refer to this post as: Giorgio Sassine (Assistant Editor for Canada and the United States) and Kiran Nasir Gore (Associate Editor), '2019 In Review: Noteworthy Developments in the United States', Kluwer Arbitration Blog, February 5 2020, http://arbitrationblog.kluwerarbitration.com/2020/02/05/2019-in-review-noteworthy-developments-in-the-united-states/

2019 was an important year for international arbitration developments in the United States, both in the commercial and investment context. Some of the more far-reaching developments included the deepening circuit court split on whether "manifest disregard" of the law is a grounds to refuse enforcement of an award, the first U.S. Court of Appeals decision post-*Intel*, addressing whether an international arbitration tribunal is a "foreign or international tribunal" within the framework of 28 U.S.C. Section 1782, and jurisprudence and thought leadership events on the topic of corruption. We also witnessed (and continue to witness in 2020) the effect of the United States' "America First" policy.

As we move into the next decade, 2020 promises to be another exciting year for international arbitration developments in the United States. This year, the U.S. Supreme Court has already heard oral arguments regarding whether a non-signatory to an arbitration agreement can compel arbitration. Moreover, we look forward to seeing what may develop with the framework for Section 1782 discovery, following the Sixth Circuit's recent holding. We are also entering an election year in the United States, which may have implications for domestic politics and foreign affairs. Each of these topics is discussed in more detail below.

1. **Key Developments Relating to the New York Convention and Arbitrability**

2019 saw several key developments concerning the New York Convention, as codified in the U.S. by the Federal Arbitration Act (***FAA***), and also the broader concept of arbitrability.

A. Interpretation and Application of the New York Convention vis-a-vis the Federal Arbitration Act

The writing requirement pursuant to Article II(2) of the New York Convention in the context of non-signatories was considered by the Eleventh Circuit in *Outokumpu Stainless USA, LLC, et al. v. GE Energy Power Conversion France SAS, Corp.* As explained by our contributor, Outokumpu entered into

supply contracts for mill motors that appended a subcontractor list with mandatory suppliers, one of which was GE. Each supply contract contained an arbitration agreement. When the motors failed, Outokumpu commenced suit against GE and GE sought to compel arbitration. The Court held that "there was no arbitration agreement in writing within the meaning of the Convention between Outokumpu and GE," reasoning that "private parties … cannot contract around the Convention's requirement that the parties *actually sign* an agreement to arbitrate their disputes in order to compel arbitration."

Oral argument was heard by the U.S. Supreme Court on January 21, 2020 and the core issue under consideration is whether the New York Convention "permits a non-signatory to an arbitration agreement to compel arbitration based on the doctrine of equitable estoppel." We can anticipate a decision on this question within the next few months.

The concept of "manifest disregard" of the law as a grounds for refusing enforcement of an international arbitration was considered by the Second Circuit in *Weiss v. Sallie Mae, Inc*. As explained by our contributors, the Second Circuit accepted the manifest disregard of the law argument as a valid basis for challenging awards. This further cements a circuit split within the U.S., where certain Circuit Courts, including the Eleventh Circuit, will not accept "manifest disregard" of the law as a valid basis for vacating an arbitral award because it is not expressly provided as a ground under the FAA. This issue continues to ripen and we can expect that it will, in the coming years, be considered and clarified by the U.S. Supreme Court. This will be a welcome development, as the U.S. Supreme Court has not considered the matter since 2008, when in *Hall Street Assocs., LLC v. Mattel, Inc.* as summarized by our contributors, the Supreme Court "ruled that the only bases for vacating an arbitral award are the ones expressly stated in the FAA, which does not included manifest disregard, but declined to rule that manifest disregard was dead."

B. Arbitrability

During 2019, the U.S. Supreme Court considered key principles of international arbitration in *Schein, Inc. v. Archer & White Sales, Inc*. The holding in *Schein* maintains that "courts must respect the terms of the arbitration agreement as written and that, if the parties agreed, an arbitral tribunal has the power to decide questions of arbitrability." In summary, The Court maintained its holding in *First Options*, that "courts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so."

We also learned what can happen when state law is not drafted with arbitration mind, reinforcing the importance of choosing a respected arbitral seat. In *Stemcor USA, Inc.*, this dichotomy was front and center when a party attempted to use state law legal procedures to attach property to support an arbitration award. *Stemcor USA, Inc.* involved breaches of multiple contracts due to failures to deliver pig iron. As a result, Daewoo International Corp. filed an action in Louisiana federal district court to compel arbitration and sought writs of attachment.

While arbitration is often touted as an efficient and quicker way to resolve a dispute, the writ of attachments spawned litigation that ran on for years, as a result of jurisdictional issues, appeals, and the Fifth Circuit certifying the question to the Louisiana Supreme Court. "Finally, more than six years after getting the attachment, and with three District Court Decisions, three Fifth Circuit decisions, and a Louisiana Supreme Court decision, Daewoo got to hold onto its pig iron proceeds."

2. **Advancements in the Global Discovery Debate**

Perhaps the greatest headline-making development during 2019 involved 28 U.S.C. Section 1782, the statutory provision which permits a U.S. district court to order testimony or produce documents in aid of a proceeding before a "foreign or international tribunal." Several of our contributors covered new developments, which highlight the deepening circuit split over whether such discovery may be provided to aid a private international arbitration tribunal. During 2019, a New York federal district court judge allowed such discovery in aid of an LCIA arbitration, another New York federal district court judge declined such discovery in aid of a CIETAC arbitration, the federal district court in the District of Columbia denied a request for production of documents, while allowing a request for written answers by way of interrogatories (as discussed in the following section of this post), and the Sixth Circuit allowed discovery in aid of a DIFC-LCIA arbitration.

As 2019 developments alone create a more deeply entrenched debate, practitioners are working arduously to further relevant jurisprudence and its understanding. At the end of 2019, the first book considering Section 1782 discovery as an independent discipline was published. Meanwhile, early this year, the Second Circuit is expected to settle internal disparity among the district courts over which it has jurisdiction through the much awaited appellate decision in *In re Hanwei Guo*. Guidance of the U.S. Supreme Court is become increasingly welcome by U.S. practitioners. Meanwhile, as Section 1782 discovery continues to proliferate, practitioners cannot help but wonder how it might interact with more global views of disclosure and discovery, particularly in light of the French blocking statute and GDPR compliance.

3. **Allegations of Bribery and Corruption in Arbitration Proceedings**

Issues of corruption were addressed in U.S. international arbitration jurisprudence. In *Vantage Deep Water Co. v. Petrobras Am., Inc.*, a Texas federal district court denied Petrobras' motion to vacate Vantage Deepwater Drilling's arbitral award based on corruption of the underlying contract. Petrobras submitted that the award should be set-aside pursuant to the Inter-American Convention on International Commercial Arbitration. While Petrobras argued that the bribery violated U.S. public policy (one of the narrow exceptions to enforcing an arbitral award under U.S. federal law), the Court "took the view that public policy did not refer to any international notion but rather should be examined with respect to Texas law. In this case, Petrobras continued with recognizing the agreement with the knowledge of the bribery allegations, and thus, ratified the agreement under Texas law." As explained by one of our contributors, the case is particularly "notable in that it squarely acknowledges that a state actor or state-owned entity should not use their own misconduct as a defense, particularly when they later ratified that conduct."

In re Application of The Islamic Republic of Pakistan v. Arnold & Porter Kaye Scholer, LLP demonstrated that various compelling and current issues can intersect in the context of any one case. The federal district court for the District of Columbia considered Pakistan's request for Section 1782 discovery from an investor's American counsel in aid of an ICSID arbitration and pending criminal investigations in Pakistan against the backdrop of corruption allegations. As explained by our contributor, the Court ultimately denied the request for production of documents, recognizing that the jurisdictional reach of the ICSID tribunal and Pakistani criminal authorities encompassed the scope of relevant materials and, moreover, that attorney-client privilege might undermine the substance of the request. However, Pakistan's request for written answers by way of interrogatories was granted.

Reflecting the arbitration community's increasing interest in bribery and corruption in arbitration proceedings, such allegations were also considered during the ILA American Branch Investment Law

Committee's conference titled "*What to Do About Corruption Allegations? Debating the Options for Investment Law*" held on February 19, 2019 in Washington, D.C. The conference addressed the resolution of corruption allegations in international investment arbitration following the *Metal-Tech Ltd. v. Uzbekistan* and *Spentex Netherlands, B.V. v. Uzbekistan* awards. In the aftermath of those awards, the field of investment arbitration has grappled with questions regarding the proof of corruption and response to findings of corruption. Those awards combined flexible evidentiary techniques for assessing corruption allegations with the outright dismissal of the arbitration upon finding corruption. The conference addressed whether and to what degree investment arbitration should follow such approaches to addressing corruption.

4. **Domestic and Regional Developments – Carrying Global Significance**

Upon his return to the Blog, our General Editor, Prof. Roger Alford, highlighted *United States v. Novelis*, where the U.S. Department of Justice's Antitrust Division pursuant to the Administrative Dispute Resolution Act of 1996 (and the Antitrust Division's implementing regulations) "took a novel approach of using arbitration to challenge [a] merger" for the first time in U.S. history, which typically sues in federal court.

While foreign policy is not usually a focus of the Blog, its interaction with international disputes cannot be denied. During 2018 and 2019, we have seen a number of developments initiated by the U.S. "America First" protectionist approach to economic sanctions and we enter 2020 with a changed view of the landmark 2015 Joint Comprehensive Plan of Action (***JCPOA***) Iran nuclear deal. The U.S. walked away from the deal in 2018, and in response, Iran decreased its compliance efforts. This created a ripple effect in the world of extraterritoriality, conflict of laws, and secondary sanctions.

In recent weeks, global headlines were made when the E.U. partners of the JCPOA indicated their intent to invoke the deal's dispute resolution mechanism. On the private dispute resolution side, challenges concerning available claims and defenses may emerge as international actors encounter disputes related to their international activities. Our contributors directly considered the dilemma and practical concerns faced by international arbitrators. This is a new and emerging area of law to be closely watched by global practitioners.

Meanwhile, "NAFTA 2.0," the U.S.-Mexico-Canada Trade Agreement (USMCA), continued toward ratification and entry into force. As reported in our 2018 year in review post, this is a significant regional development as the USMCA's Chapter 14 departs from NAFTA's Chapter 11, both in terms of procedure and substance of protections available to prospective investors. As reported earlier on the Blog by assistant editor Enrique Jaramillo, the significant advancements made in recent weeks likely mean the USMCA will enter into force in May 2020. It is also likely time for practitioners to consider the timing of legacy claims under original NAFTA, before it is no longer in force, and its interaction with the USMCA as it enters into force and heralds a new era in regional investor-state dispute settlement.

2018 In Review: A View From the United States

Kluwer Arbitration Blog
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As we head into the new year, it is worth reflecting on major international arbitration-related developments in the United States during 2018 and their coverage on the blog.

Early in the year, our authors homed in on the U.S. Federal Arbitration Act (***FAA***), which embodies U.S. arbitration law, including the New York Convention. As one of our authors wrote, the FAA "is the oldest – but still functioning – arbitration statute in the world. Case law has rewritten much of its content, so that the statute's true content is buried in federal decisional law." These words might as well become a mantra for relevant developments:

- In January, the Ninth Circuit federal appellate court reviewed an arbitration agreement in a maritime insurance policy and considered whether it was "reverse preempted" by the McCarran-Ferguson Act. The Act permits states to "trump" otherwise applicable federal law, if (i) the state law regulates the business of insurance, (ii) the conflicting federal law does not, and (iii) the federal law would "invalidate, impair, or supersede" state insurance law. The Court enforced the arbitration agreement under the

FAA and concluded that the parties' sophistication confirmed their ability to agree to AAA arbitration for coverage disputes (original post here).

- In February, a New York state appellate court issued a decision that has curtailed "a procedural loophole in Chapter 2 of the Federal Arbitration Act." Our author explained that New York provides an alternate path toward enforcement of foreign arbitral awards: Under Article 53 of the New York Civil Practice Law, parties may first obtain a foreign court judgment recognizing the award, and then seek recognition of that judgment as a foreign money judgment. This approach allows enforcing parties to obtain recognition of a foreign money judgment even if the enforcing court lacks personal jurisdiction over the debtor party (which, in contrast, is required for enforcement under the FAA). The Court's decision limits the utility of this tactic and we will likely see its full impact over time (original post here).

- In March, a Texas federal district court considered whether, under the FAA, a consent award (entered into before a final hearing) is subject to confirmation. The respondent argued that the Court lacked jurisdiction because (i) the New York Convention is generally silent on the treatment of settlement awards and (ii) the issued award was not a reasoned award. The Court rejected both arguments, finding that the parties requested the award, commented on a draft of it, and that the award otherwise operated within the context of the arbitration (original post here).

- Finally, in May, in *Epic Systems Corp. v. Lewis*, the U.S. Supreme Court held in a 5-4 majority that one-on-one mandatory employment arbitration agreements must be enforced as written. The Court held that, unless the arbitration agreement violates a party's basic contract rights (*e.g.*, it was procured through fraud or duress), the clear terms of the arbitration agreement prevail. Justice Ginsburg issued a thoughtful dissent which dissected the intent of the FAA's Section 1 (original post here).

Out West, California emerged as a true forum for arbitration. The Silicon Valley Arbitration & Mediation Center (SVAMC) is now a resource for the promotion of dispute resolution in the global technology sector. Its potential is fully unlocked by foreign attorneys' new-found ability to participate in international arbitrations conducted within the state (coverage here).

Of course we cannot ignore the elephant in our region: In 2017 President Trump announced his intent to renegotiate NAFTA, which has existed unchanged since 1994. As we waited patiently for concrete developments, our authors commented on the future of NAFTA, including the opportunity to strengthen ISDS' public policy perspective and post-Brexit scenarios where the UK might wish to join NAFTA (part 1 and part 2).

In October 2018, President Donald Trump delivered what many of us have dubbed NAFTA 2.0. But of course the treaty has a new name and a different approach to match. The dispute resolution procedures of the proposed U.S.-Mexico-Canada (USMCA) Trade Agreement depart from NAFTA's Chapter 11. Our authors explored their initial impressions, analyzed specific provisions, and discussed the possible effect on ISDS globally.

Even after the November 30th signing ceremony at the G-20 Summit in Buenos Aires, the USMCA is not yet the law of the land. Each country must now follow its domestic procedures for ratification, and in the U.S., this will mean Congressional approval.

President Trump tweeted on the same day as the signing ceremony that the USMCA represents "one of the most important, and largest, Trade Deals in U.S. and World History." I am inclined to agree with him. Once finalized it will account for more than $1.2 trillion in trade in one of the world's largest free trade zones.

During 2019 we are sure to see further developments in each of these areas.