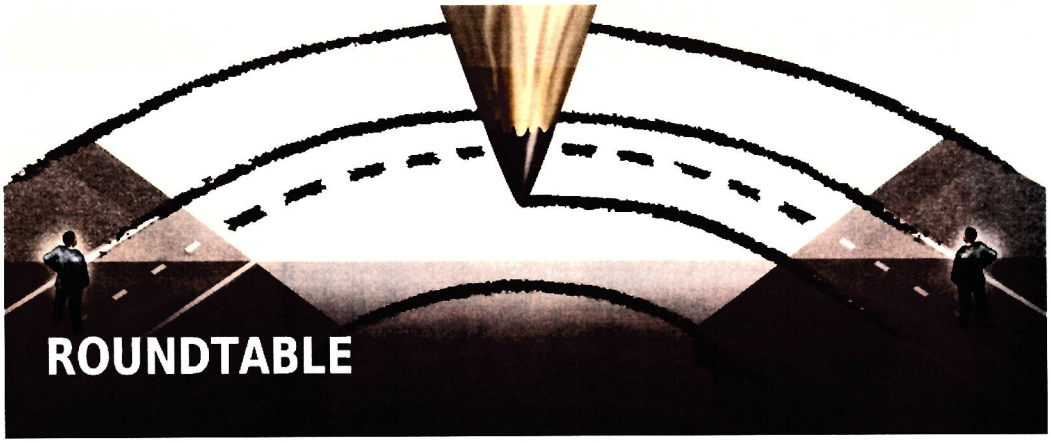
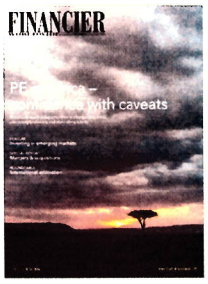


International arbitration



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International arbitration is extremely advantageous in that parties can select a neutral forum, choose the law applicable to their proceedings, designate highly specialised arbitrators specific to their dispute, ensure proceedings are confidential and obtain an award that will be more easily enforceable abroad. Furthermore, although there are significant issues surrounding the time and costs associated with the arbitration process, as well as major concerns over how to ensure that arbitrators are independent and impartial, international arbitration is undoubtedly the current dispute resolution method of choice among transnational business operators.

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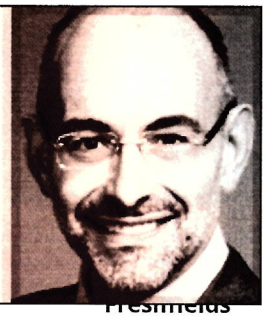

scepticism about the future of investment arbitration prompted by the reluctance of some important countries to accept the awards rendered in these proceedings. Moreover, there is a growing trend in Latin America to exclude from these types of arbitrations certain sovereign decisions related to the control of their energy resources. At the same time, at least in Mexico, the government has been working on modernising the legal system to solve commercial and civil disputes. This modernisation is aimed at incorporating with full force not only arbitration, but also other ADR methods into the daily life of citizens.

Kleiman: There has been a fierce debate on the inclusion of clauses providing for investor-state arbitration in the free trade agreements negotiated over recent months. Transparency of the arbitration proceedings has been at the core of these debates. On 5 October 2015, the Trans-Pacific Partnership (TPP) was signed between the United States and 11 countries. Another free trade agreement was signed a few weeks later between the European Union and Vietnam. While the TPP provides for investor-state arbitration for the purposes of dispute settlement, the EU-Vietnam free-trade agreement provides for resolution of investor-state disputes through an investment tribunal system, which is praised by the EU.

Sikora: I can discern two principal trends: the maturation of international commercial arbitration as a dominant and truly global method of dispute resolution between contract parties and the sustained attack on investor-state arbitration as the method for resolving disputes between investors and host states (ISDS). With the widespread adoption of international commercial arbitration and the great increase in the numbers of cases, parties and counsel representing parties, participants have come to a realisation that the assumption that all counsel share the same norms, rules and approaches has become unsustainable. As to the second trend, it seems that after carefully establishing a trade and investment promotion system of treaties and institutions premised on investor-state arbitration as the mode of dispute resolution, many states are having buyer's remorse.

Ewerlöf: Besides the ISDS discussions in relation to the negotiations of TTIP, one recurring talking point is whether or not there is a need for more active tribunals. Should tribunals seek to establish the 'truth' or only assess the parties' claims as presented? Another reoccurring theme is the client's wish for cost-efficient proceedings and measures to deal with this. Furthermore, a frequently debated question is the increase of documents in arbitration proceedings – are we moving toward a lighter version of US-style discovery? And if so, in whose interest?

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Deane: There is definitely increased attention being paid to arbitrator 'conflicts', and whether certain very strict approaches which appear to have taken hold in some legal systems and within a few institutions truly recognise the reality of the interconnected arbitral community, or otherwise are really in the best interests of users. In Canada, we have also seen the development of a judiciary that increasingly recognises the importance of arbitration, and understands the judiciary's role in ensuring the effectiveness of the arbitral process. A third trend is the expanded awareness of the potential availability of third-party funding, which is particularly important in a jurisdiction, such as Canada, in which many resource exploration and exploitation companies are based.

Ford: There is a strong push in most arbitral institutes to reduce time and cost of arbitrations and to improve rules and procedures. For example, a number of institutions such as the Singapore International Arbitration Centre have changed their rules to permit joinder of non-parties, thus avoiding a multiplicity of proceedings and the possibility of conflicting results in different proceedings.

"There is a strong push in most arbitral institutes to reduce time and cost of arbitrations and to improve rules and procedures."

— Cameron Ford

Staines: Is there any recent case-law which may have a broad international impact, in particular, which has caught your attention? If so, what can we draw from it?

Ewerlöf: The judgement in *Systembolaget vs. the Absolute Company* addresses an important issue of principle. It is one of very few European judgments dealing with the relationship between the principles of arbitration and EU competition law, as well as the scope of the so-called Eco Swiss doctrine. According to this doctrine, the EU competition rules are part of public policy, which, *inter alia*, means that they may serve as the basis to set aside an arbitration award under certain circumstances. The Supreme Court found that it was obvious that the tribunal's assessment of competition law was not in violation of EU law. Hence, the Supreme Court upheld the tribunal's award.

Deane: The continuing efforts by Stans Energy to enforce an award issued against the Krygyz Republic in Canada have attracted significant attention. The case has required Canadian courts to consider issues of sovereign immunity, the use of state-controlled entities to hold shares in third-party companies, and the practical and theoretical implications of an award having been set aside at its seat. The case provides an example of the complexities of enforcing an award rendered in an investor-state arbitration, and demonstrates that obtaining the award

is only the first step in an often complex process.

Sikora: While case law has somewhat diminished importance in the context of international arbitration, two recent decisions are significant. First, in November 2015, an ad hoc committee partially annulled the *Occidental vs. Ecuador* ICSID award. The committee differed with the original tribunal over the treatment of a Farmout Agreement between the claimant and a third-party pertaining to oil production and reduced the award by the amount attributed to the farmed out interest. The second development is the set aside of the $50bn Energy Charter Treaty award in favour of Yukos and against the Russian Federation. It reflects the risk inherent in set aside applications to supervisory courts of general jurisdiction in the place of arbitration.

Kleiman: Two recent decisions rendered by French courts in the field of international commercial arbitration are worth noting. In a landmark decision dated 13 May 2015, the French Supreme Court ruled that a waiver of immunity from execution would be valid provided that it be express, thereby appearing to abandon the requirement that the waiver be also 'specific'. This decision is in line with the 1961 Vienna Convention on Diplomatic Relations and the New York Convention on immunities dated 2 December 2004 which has been signed and ratified by France despite not being binding yet. In a decision dated 8 July 2015, the French Supreme Court established the jurisdiction of civil courts to rule on the enforcement of any foreign arbitral awards, even in matters related to French public-law contracts between a French public party and a foreign company.

Venegas: There have been recent decisions establishing that the validity or legality of an arbitral award should not be deemed as a formal 'act of authority' and, thus, it cannot be directly challenged through a constitutional proceeding (*amparo*). The impact of this decision is beneficial for international commercial arbitration since it guarantees that no Mexican Court would revise the merits of an international award.

Acuner: The recent decision in *Pearl Petroleum Co Limited vs. Kurdistan Regional Government of Iraq* will have a potentially significant impact on oil & gas-related arbitrations against state entities where it is necessary to enlist the assistance of the English courts. The English High Court in that case held that in entering into a contract for the long-term exploitation of the state's oil or gas, a state entity exercises sovereign authority within the meaning of the UK State Immunity Act, 1978 – such contracts do not constitute mere commercial transactions. This case-law suggests that, subject to the other provisions of the 1978 Act, a separate entity of a state is *prima facie* entitled to assert sovereign immunity under the 1978 Act in relation to disputes arising out of oil & gas contracts which it has entered into.

Staines: What are the advantages that international arbitration offers to disputing parties? Are there any limitations which you think could or should be improved on?

Sikora: International arbitration is about fair, independent and impartial resolution of contract disputes by expert tribunals. It allows

contractual parties to opt out from dispute resolution by a local court of general jurisdiction, which, depending on the jurisdiction, may not understand the business and dispute in question, could be pressed or even overwhelmed by the court's general docket, could be subject to political pressure, national biases or in some cases even to corruption. In addition, an arbitral award, unlike a national court judgment, is recognised and enforceable in all jurisdictions that allow for the recognition of foreign arbitral awards.

Deane: Due to the widespread adoption of the New York Convention, an international arbitration award is portable and can be enforced, subject to limited exceptions, in most major trading countries throughout the world. This is a significant benefit for parties finding themselves in disputes with parties of differing nationalities. Whether the other oft-cited advantages of international arbitration – flexibility, efficiency and confidentiality – are realised in a particular case depends in large part on the decisions taken by experienced counsel and a sophisticated tribunal. International arbitration remains consent-based, though, which creates challenges if evidence must be obtained from third parties which have not accepted the tribunal's jurisdiction, or which are otherwise uncooperative.

Acuner: A key advantage of international arbitration is the ability which it affords parties to appoint arbitrators of their own choice while at the same time benefiting from an independent and neutral decision-making process which ultimately results in an effective arbitral award. Party autonomy in shaping and adapting the conduct of the proceedings to the dispute – including on issues of confidentiality – is another attractive feature of international arbitration. While speed and cost-efficiency are often mentioned among the advantages of international arbitration over court litigation, whether such features are in fact present will depend on the particular circumstances of the case and the dispute resolution process, including the conduct of the parties to the arbitration.

Ford: International arbitration benefits from the wide enforceability of awards under the New York Convention, and the flexibility of its proceedings. At present, arbitral awards are enforceable in more countries than court judgments. While flexibility is an advantage, it can at times be a disadvantage in the time taken to conduct the interlocutory process. Courts, particularly international ones such as the Singapore International Commercial Court, have the advantage of bearing the imprimatur of the state rather than merely the consensus of the parties. Judges are more likely to make and enforce more rigorous orders and timetables and to limit issues and time. This can result in cheaper, faster decisions.

Kleiman: Commercial arbitration provides business operators with a means to resolve their disputes according to a bespoke procedure. In international commercial arbitration, parties are allowed to reach a neutral forum, choose their own judges and hence avoid the risk of being sued before their counterparty's domestic courts. They can choose the law applicable to their proceedings, including the rules applicable to evidentiary issues. They can choose highly specialised

arbitrators for the purposes of their specific dispute. They can ensure that confidentiality of the proceedings is observed. Finally, they can obtain an award that will be more easily enforceable abroad than domestic judgements, on the basis of the New York Convention of 1958.

Venegas: The obvious advantage for complex disputes is the possibility of having a panel of highly technical and experienced arbitrators hearing and resolving the case. Notwithstanding, the main challenge ahead refers to the need to increase the number of recognised arbitrators available for civil law countries. The number of available arbitrators who may be able to properly understand cases subject to civil law which, in addition, may have some connection with administrative law, is very limited. Since arbitration involving infrastructure disputes with government bodies has increased, it has become imperative to have professionals who are able to properly handle these types of cases, not only as attorneys but mainly as arbitrators.

Ewerlöf: The advantages of international arbitration are, first and foremost, that the parties will have an independent and qualified tribunal resolving their dispute. The resolution of the dispute is fast compared to most domestic courts. In addition, an international tribunal will be more experienced dealing with international disputes and more keen on adopting international best practice, which serves to avoid national peculiarities in domestic courts. Finally, an award in an international arbitration will be enforceable in most jurisdictions around the world under the New York Convention. One of the limitations which should be improved is the handling and enforceability of interim measures.

"A key advantage of international arbitration is the ability which it affords parties to appoint arbitrators of their own choice."

— Melis Acuner

Staines: What advice can you offer to parties in relation to administered arbitrations? Can you outline the key considerations involved in choosing an institution?

Acuner: Key considerations include whether the rules of the institution provide for confidentiality, an expedited procedure for the constitution of the tribunal, the appointment of an emergency arbitrator, the ability for the tribunal to order provisional measures, an annulment process separate from any setting-aside proceedings in the national courts of the seat, the possibility for the institution to scrutinise or review the arbitral award, and likely costs. Giving advice to a party will involve weighing the relative importance of each of these considerations in

light of the specific circumstances of the case.

Ford: The ultimate purpose of an arbitration is to have an award that is enforceable. This should be the guiding principle in deciding whether to arbitrate through an institute or ad hoc, and which institute. Saving a few dollars in the early stages may be a false economy if it results in an unenforceable award. The other considerations are the perennial ones of time and cost, as well as the institute's rules. Some institutes have time limits for the delivery of awards which can be helpful, even if difficult to enforce in practice. Institutes charge differently, with some being ad valorem and others being time based.

Ewerlöf: Nowadays, most institutions offer a set of rules which are both flexible and predictable. This implies that you will have administrative support from the institution and rules to apply if one of the parties is somehow obstructing proceedings. When choosing, for example, the ICC or the SCC rules, the costs for the tribunal will also be predictable since the tribunal will be paid on an ad valorem basis, which is not the case under the LCIA rules, for example. For very experienced parties, the need for the administrative support from the institution may be less important. Moreover, in cases where the amount in dispute is very high but the issue in dispute is not that complex, an ad valorem remuneration of the tribunal may be less attractive. In the end, the choice of arbitrators, in particular the chairperson, will be of utmost importance to the handling of the dispute, but this is true for both institutional and ad hoc proceedings.

Kleiman: Selecting an arbitration institution is one of the key elements involved in the drafting of the arbitration provisions contained in international contracts. In choosing an arbitration institution, parties should consider the adequacy of the institution's rules to the dispute, as well as the availability, proactiveness and reputation of the institution. They should also consider the type of services rendered by the institution, such as administrative services, prima facie control of arbitral jurisdiction, and review of awards. Fees of the institution and costs of the services, such as hearing rooms and translation equipment, also need to be considered. It is highly recommended to have dispute resolution practitioners involved from the outset in drafting arbitration clauses as they would carefully review the rules of the arbitral institutions and select those which are most suitable to the parties' needs.

Sikora: In essence, every arbitration must be administered. The question is only whether it is going to be administered by a specialised institution or by the tribunal itself. In most cases, it is much more efficient for the administration to be done by someone other than the chairman. Administered arbitrations are particularly useful arbitrations against less experienced or more difficult parties, including states or state parties. The tribunal can certainly use the assistance of an administering institution when dealing with more difficult parties.

Venegas: The most important advice when choosing an institution would be to identify, from the beginning, any worst-case scenarios and the amount of potential disputes that could arise in those contracts

that are subject to arbitration. Once this exercise has been carried out, the parties should identify an institution which would be cost-effective in its fees and the schedule fees of the arbitrators. There are institutions which are built around the administration of large international cases, while others – mostly domestic – may be more suitable for handling less complex arbitrations. Therefore, the key to identifying the best institution is based on the complexity and amount of potential disputes, as well as the cost of arbitrating them.

Deane: Selecting the rules of a credible institution is very important when crafting an arbitration agreement. While it may be that the parties will dispense with the services of an institution in the event of a dispute years later, having an institution available as a default selection is a useful way to avoid a situation in which a proceeding becomes deadlocked right at the outset. The best institutions have experienced case managers who are deeply involved in the arbitration community, and know which cases need a 'light touch' and which may benefit from more active administration. Administering an arbitration proceeding is a bit of an art, and a one-size-fits-all approach rarely works.

"The obvious advantage for complex disputes is the possibility of having a panel of highly technical and experienced arbitrators hearing and resolving the case."

— Marco Tulio Venegas

Staines: When resorting to international arbitration, what are the additional challenges that commonly arise in comparison to domestic arbitration?

Venegas: The main challenge between international and domestic arbitration continues to be the different legal cultures that it may bring to the table. Procedural habits and traditions are diverse in common and civil law. This may lead to a disconnect between the parties in the different stages of the arbitration. For instance, although uniform rules for the production of documents have been developed by institutions such as the IBA, in practice the understanding about the scope of the production and the manner to achieve it are clearly different. Among the members of the arbitral tribunal, this situation may also lead to inner tensions about the best manner to resolve a certain aspect of the dispute.

Deane: Apart from the inevitable logistical issues associated with having hearings in disparate locations, a feature of international arbitration which, ironically, greatly assists concentration by counsel in the course of a hearing, the additional challenges are cultural in

nature. In almost every case, one is compelled to confront one's own unconscious inclinations about procedural and substantive matters, and be open to recognising that other legal traditions often have devised a better way to address the same problem. That constant re-examination of 'accepted wisdom' and learning about other legal systems is part of what makes international arbitration such an engaging area in which to practice. One case is never the same as another.

Ford: Ensuring the enforceability of the award in a foreign jurisdiction is an additional challenge, as is dealing with parties and lawyers from different legal systems or traditions. Sometimes submissions and approaches of the opposing parties do not engage with each other because of different advocacy or practice traditions of the opposing lawyers. These and cultural issues can add layers of complexity.

Acuner: Choosing a seat for the arbitration is a critical decision in international arbitration which does not arise in domestic arbitration. This decision involves a careful review of the international arbitration law and policy of each candidate country, including the stance of the domestic courts vis-à-vis international arbitration. In addition, in international arbitration, the assets of the respondent will more often be located outside of the seat of the arbitration, which may give rise to enforcement issues that would not arise in the domestic context. Parties must therefore carefully consider the potential role of the courts where the prevailing party may seek to enforce the arbitral award.

Ewerlöf: In international arbitration, procedural issues are more frequently at hand in comparison to domestic arbitration. This may be the result of different cultures between the parties and also among the arbitrators. Notwithstanding that international arbitration has become more harmonised over the past decades, with the implementation of, for example, guidelines from the IBA and the establishment of an international arbitration practice, there is still some tension between the civil law and the common law approach to, for instance, documentary evidence and hearing of witnesses, among others. Moreover, such tension is also seen in arbitrations between parties from developed and developing countries, respectively.

Sikora: The fundamental difference in international arbitration is that the counterparty is presumably from another jurisdiction. As such, the counterparty can simply not show up. There is very little the arbitral tribunal can do other than to proceed in absentia and issue an award. Similarly, the losing party can ignore the award, forcing the winning party to bring an enforcement action in a jurisdiction where it or its assets can be found under the New York Convention, another convention or local law. The defaulting party can then oppose enforcement on various grounds hoping to defeat enforcement or to simply play for delay.

Kleiman: Arbitration is the only method of dispute resolution that allows international business operators to have access to a genuinely suitable forum to resolve their disputes. However, international

arbitration often requires dealing with additional challenges that may arise in the course of the proceedings. Resorting to international arbitration often requires overcoming the difficulties deriving from the parties, counsel and arbitrators' different legal cultures. This is notably the case when managing the parties' expectations as regards the conduct of the proceedings and procedural matters such as document production requests. Difficulties may also arise in relation to the ethical rules and professional standards applicable to counsel and arbitrators, since their activities may be regulated by different rules and authorities.

Staines: Given the complexities involved with current international arbitration proceedings, in your opinion, do general processes, guidelines and protocols need to be streamlined to assist understanding and efficiency for the parties involved? Is international arbitration becoming too process-driven?

Ford: Arbitration has departed from its informal roots to become very much like litigation. This is in part due to its success and it being applied in large, complex, international disputes where the processes of litigation were considered necessary. Parties now complain that arbitration is slower and more expensive than litigation in many instances. This has led in turn to the development of expedited procedures by a number of institutes. In my view, there is scope for further refinement of interlocutory and substantive determination procedures in arbitration. The full suite of procedures and requirements can be reserved for those disputes requiring them, but for others a more summary procedure could be adopted akin to the construction security of payments regime in many common law countries these days.

Kleiman: Guidelines, protocols and more generally notes which are intended to govern the arbitration proceedings all share the same goal: to streamline the arbitration process, by offering unified rules which are designed to provide appropriate responses to issues that may arise in the course of the arbitration proceedings. As such, these documents are a valuable resource for the purpose of rationalising the arbitration process. As an example, the IBA Guidelines, such as those on conflicts of interest, as well as the IBA Rules on the Taking of Evidence in International Arbitration, have become quasi-universal instruments and are applied in a large number of arbitration proceedings.

Deane: The proliferation of 'soft law' in terms of guidelines and best practices is becoming a matter of some concern. The efforts being made at developing these principles are laudable, but the reality is that even though the guidelines are often expressly permissive and not mandatory, they frequently become effectively mandatory in practice. One of the great virtues of international arbitration is the flexibility it offers to craft the procedure that is optimal for the particular case, even if that procedure bears little resemblance to the procedure deployed by counsel and the tribunal in their last case, while always being attuned to considerations of procedural fairness. New procedures arise through experimentation, and it would be

unfortunate if the proliferation of 'soft law', and the risk of its ossification into effectively mandatory rules of practice, inhibited the creativity of the arbitration community in this regard. It is something to watch.

Ewerlöf: Although the variety of guidelines and protocols to a certain extent are beneficial to the harmonisation of international arbitration, which is good, one must be careful not to lose one of the main advantages with arbitration: flexibility. There is no 'one size fits all' in arbitration. It should be the parties who determine the procedure and for the tribunal to handle the arbitration in the most efficient way, securing the legal rights of the parties, within the framework agreed upon by the parties. Guidelines and protocols may be used for the proper understanding of international arbitration and for the benefit of a level playing field, but should never overshadow the parties' discretion to have the dispute resolved in the way they want.

Sikora: All processes evolve over time. Similarly, international arbitration has become more complex with additional rules and guidelines aimed at levelling the playing field. As a result of the harmonisation of arbitration practices between the common law and civil law practitioners, in part by the enactment of the IBA Rules on the Taking of Evidence, document discovery has also crept into international arbitration and become a standard practice.

Venegas: I consider that although guidelines and protocols have been issued to facilitate and expedite arbitration, they may sometimes produce the opposite effect. However, as always, this is not just a matter of rules, but a matter of the people implementing them. When the arbitration is handled by experienced attorneys and arbitrators, the use of guidelines proves to be an effective tool to solve several procedural issues. However, when not all the parties involved have the same experience, then it is up to the arbitrator to identify the circumstances and conduct the arbitration in a way which is not too burdensome for the neophyte eliminating excessive reference to the existing guidelines and substituting it with clear and short procedural orders.

Acuner: In my experience, there is not a serious problem with the general processes, guidelines and protocols under which international arbitration is conducted. Institutional rules of arbitration, such as the LCIA Arbitration Rules, and 'soft-law' guidelines, such as the IBA Rules on the Taking of Evidence, represent user-friendly and streamlined standards that provide both tribunals and the parties with the tools to conduct an efficient, fair and effective arbitration. Problems typically arise when one or both parties seek to abuse the inherent flexibility and party-driven nature of the arbitral process under the guise of procedural fairness, raising the spectre of annulment on due process grounds once the award is rendered.

"Arbitration is the only method of dispute resolution that allows international

business operators to have access to a genuinely suitable forum to resolve their disputes."

— Elie Kleiman

Staines: What role does Investor-State Dispute Settlement (ISDS) have to play in today's globalised market? Why has it come under attack in recent treaty negotiations?

Acuner: While ISDS has come under fire from various governmental figures and NGOs in recent years, it remains, to a large extent, the only dispute settlement mechanism which allows foreign investors to hold states accountable for their wrongful actions directly, without having to resort to the highly political and archaic diplomatic protection mechanism which requires the espousal of their claims by their country of nationality. Arguments raised by the critics of the ISDS system have included allegations that investment treaty tribunals – which are composed of a small, elite group of partisan arbitrators whose bread and butter is ISDS – have an interest, financial or otherwise, in interpreting broad and vague substantive treaty provisions in a pro-investor manner, and therefore cannot be truly impartial and independent.

Sikora: Investor-state arbitration has been a crucial element of international capital flows. For instance, what energy or infrastructure investor would commit billions of dollars for years or decades before seeing any return without the certainty of neutral dispute resolution? The great irony is that jurisdictions with the greatest need for foreign investment are also the jurisdictions where the local courts can be least friendly to foreign investors. Accordingly, these are the jurisdictions to which the mechanism of international arbitration brings the maximum benefit. Again, it is ironic that in many of these jurisdictions there is often a push to deny investors the ability to resort to international arbitration.

Kleiman: Investor-state arbitration is currently criticised by civil society groups and NGOs which argue that the existing system unfairly restricts the right of states to regulate in the public interest and is undermined by conflicts of interest on the part of arbitrators. Partly because they incorporate arbitration clauses, the free trade agreements which are currently being negotiated, such as the TTIP, and those which have been signed, raise public concerns. Transparency is one of the major concerns. In response to criticism, provisions imposing transparency requirements have been inserted in the free-trade agreements. As long as there will not be a permanent international court for the resolution of investment disputes, arbitration will remain the only available neutral forum to settle investor-state disputes.

Venegas: The economic crisis led to an increase in investor-state cases. However, the increase in conflicts has put the awards rendered

in these cases into the limelight. The nature and importance of the interests in play have, therefore, made this type of arbitration a target of states or international organisations which perceive it as an intrusive mechanism of transnational companies. In addition, the fact that free trade has been identified by some groups of academics and politicians as one of the factors responsible of the crisis has also led to a general distrust of this type of dispute resolution method. I consider that this climate has provoked some states to to put in place locks to eradicate the possibility of resorting to this investment protection mechanism.

Deane: The availability of investor-state dispute settlement is of considerable importance to parties based in Canada, many of which are engaged in the resource-extraction industries, and many of which operate in jurisdictions which do not have stable and independent court systems. ISDS facilitates the flow of capital across borders, including to the benefit, obviously, of the host states. Having said that, it should not necessarily be a surprise that investor-state arbitration has become controversial in certain recent investment treaty negotiations as, in many respects, the system straddles the boundary between public policy and private rights. These two spheres are not necessarily incompatible but, given the importance of that boundary, it is likely that all would benefit from increased transparency.

Ewerlöf: As a starting point, facilitating international trade is crucial for many of the challenges the globalised world meets today. In order to seek general peace, to amplify democracy, to fight against poverty and to protect the environment and increase sustainability, there is no better way than to facilitate and to promote international trade. In this respect, ISDS plays a very important role. ISDS is a well-functioning and important legal system which has been carefully carved out by states for centuries. ISDS will offer neutral and impartial resolution of disputes and will result in awards which must be respected and upheld by national courts under the New York Convention. Without ISDS, there is a risk that international agreements could not be enforced if needed. The current attacks on ISDS are largely based upon ignorance of the well-established and functional legal system of international arbitration, aimed at winning cheap political points at the sacrifice of international trade.

"One must be careful not to lose one of the main advantages with arbitration: flexibility. There is no 'one size fits all' in arbitration."

— Pontus Ewerlöf

Staines: How important are expert witnesses during international arbitration proceedings? In your opinion, when do you think they are most useful?

Ewerlöf: In disputes involving complex financial or technical issues, expert witnesses are most often warranted and useful. However, expert witnesses must be used with meticulous care and balance. In the preparation of a complex dispute, experts are often engaged in order to sort out financial or technical issues, facilitating the development of the party's case and supporting the party's position. The aim should be to have the complex issues more easily accessible for the tribunal's determination. This preparatory stage is also where the use of experts is most fruitful. The value of expert reports and hearing experts before the tribunal is often overestimated, but could be useful if such reports and testimonies are focused on facilitating the tribunal's understanding of a complex issue, rather than being too academic or comprehensive.

Kleiman: In international arbitration, expert witness evidence is often crucial to the outcome of the case. Where the dispute involves highly technical issues, their intervention is necessary so that counsel can build their case. Expert's views may additionally be fundamental to assist counsel and the arbitral tribunal in quantifying damages. Legal expert opinions, often delivered by specialised academics, may also be necessary where it is necessary to comfort a certain interpretation of a complex legal issue. It is important to involve expert witnesses as early as possible after the commencement of the arbitration proceedings in order to allow experts and counsel to determine and assess the proposed strategy together.

Sikora: The importance of expert witnesses depends on the nature of the case. In highly technical cases, credible expert witnesses are tremendously important and helpful to the tribunal. However, this is tempered by the realisation by tribunals that experts are retained and paid by the parties to support their positions. Thus, while ostensibly independent, they can sometimes become advocates for a party's position. As such, what is most important about an expert is not just the expertise but the credibility of the opinion. Experts are most useful in cases where there is a bona fide disagreement or ambiguity of a complex and technical nature which must be unpacked and explained to a tribunal of non-subject matter experts.

Ford: With the move away from arbitrators who are experts in the field in dispute, expert witnesses become necessary in international arbitration. Those witnesses could be ones with differing views chosen by the opposing parties, or even more independent ones appointed by the tribunal to advise the tribunal on specialised issues. Technically, according to the rules of evidence, an expert should be used wherever an opinion is expressed. While this is not applied in its full rigour in arbitration, it remains a rule of thumb, and an opinion expressed by an expert will usually carry more weight than one expressed by a layman. Expert witnesses can account for a lot of the cost in international arbitration, so how they are used is almost as important as when they are used.

Venegas: Expert witnesses are very important. Most complex cases involve the need to have an expert who is alien to legal aspects to put

one or several facts of the case into perspective. Expert witnesses are most useful when they are brought into arbitration for the right reasons to illustrate the tribunal and the parties in the logic behind the position of the parties, whether said logic lies in financial, engineering, marketing or other disciplines. If they are able to put in front of the arbitral tribunal and explain in a simple and straightforward manner the technical reasons that configure an important part of the dispute, then their role becomes essential.

Acuner: Expert witnesses often play a critical role in international arbitration. By its nature, international arbitration often involves extremely complex issues of fact which cannot properly be resolved without the assistance of experts in the specific technical, legal or quantification issues arising in the case. In our recent experience, we have used expert testimony to address, among other things, complex geological issues and the valuation of long-term oil & gas contracts. A common pitfall in the use of experts, however, is to resort to expert testimony as a matter of course, without properly identifying which are the specific issues in dispute that are critical to the case and for which their expertise is most helpful.

Deane: Expert witnesses can be very important in international arbitration proceedings, particularly with respect to complex issues of financial analysis or economic damages. They are often useful in other contexts, particularly because an expert is frequently able to distil a mass of complex information for the tribunal, and thereby ensure that hearings can be shorter and more focused. However, there is often also a countervailing risk that experts may be retained to testify on many issues which a sophisticated tribunal may well be capable of addressing themselves. Just as in litigation, parties and counsel must continually assess whether it truly is necessary to retain an expert on a particular point, recognising that an overreliance on experts may materially increase the costs of the process.

Staines: Although arbitration provides a final and legally binding award which has the same effect as a court judgment, in practice, what are the real challenges associated with enforcing an award transnationally? Is more work needed to achieve greater certainty for parties?

Deane: An international arbitration award is actually sturdier and more portable than a court judgment, given the widespread adoption of the New York Convention and the general international framework which has been developed to facilitate the enforcement of such awards. Whether an award which has been set aside at its seat may still be enforced in other jurisdictions, and whether an award-debtor must move to set the award aside at the seat, as opposed to resisting enforcement in the state where enforcement is sought, continue to be thorny issues, primarily because states have not adopted a wholly uniform approach to them. Perhaps a coordinated approach could be devised by way of a treaty, but it is likely that such issues are more practically worked out in practice and over time.

Ford: There are two steps in enforcement of awards, namely

recognition by the foreign court and then actual enforcement in the foreign country against the debtor. Recognition is becoming more uniform with fewer countries acting outside the norm in applying rules for recognition. Countries and courts are realising the importance to international commerce of awards against their citizens and companies being enforced, and are becoming less jealous of protecting their own jurisdiction. Parochial attitudes to recognition are slowly fading, with the public policy exception to recognition being less successful. Actual enforcement – that is, having the judgment issued upon the award executed against the debtor – is always problematic depending on the execution procedures within the country and the resources of the debtor.

Venegas: The greater challenge continues to be the need to generate awareness in all the local Courts about the legal impediment to revisit the merits of awards. Moreover, the legal proceedings for enforcement must be streamlined and made more time-effective. There are many cases in which the losing party may take advantage of the time that an enforcement proceeding may last, to hide assets or to generally devise strategies not to comply with the award. Thus, the legal proceedings for enforcement should allow the attachment of assets from the very beginning to put pressure on the debtor and not make time and cost its best allies.

Sikora: Enforcing international arbitral awards is unfortunately an extremely complex and difficult area. The good news has been that the majority of awards – particularly commercial awards – historically have been satisfied without the need for enforcement proceedings. The other good news is that for counterparties located in jurisdictions covered by international enforcement conventions such as the New York Convention, the process of recognition of the award is greatly simplified. Unfortunately for counterparties whose assets are located exclusively in their home jurisdiction where a foreign award is likely to be set aside, there is little that the enforcing party can do in the short run.

Kleiman: Enforcing arbitral awards is straightforward in the 156 countries that are party to the 1958 New York Convention. Pursuant to Article III of the New York Convention, contracting states must recognise awards rendered in other contracting states. Notwithstanding its liberal tone, the New York Convention provides for limited grounds under which enforcement of an award may be denied. However, much more restrictive rules apply in countries that are not party to the New York Convention, especially those that are not favourable to arbitration. In certain countries, local courts may even review the merits of a case in the context of annulment proceedings. It is important to prepare a strategy for the enforcement of a potential arbitral award at the outset in order to ensure the efficiency of the enforcement process.

Acuner: The answer to this question depends largely on two key issues. First, whether the arbitral award is an ICSID or a non-ICSID award can have significant repercussions. While the enforcement of ICSID awards is, under the terms of the ICSID Convention, quasi-

automatic in the territory of its contracting parties, the enforcement of non-ICSID awards can be resisted on a number of limited grounds. Second, enforcement in a contracting party to the New York Convention will likely be significantly easier than enforcement in a state which is not a contracting party to that convention. Even in the former case – enforcement in a New York Convention state – enforcing an arbitral award transnationally will almost always result in additional costs, including legal costs.

Ewerlöf: One of the challenges is that a party may have to initiate and conduct enforcement proceedings in several different jurisdictions in parallel. This will, among other things, drive costs. In addition, the courts in the different jurisdictions are not aligned with respect to the proceedings, which will render the enforcement more burdensome. In the best of worlds, it should be sufficient to have only one court in one jurisdiction to try the application for enforcement. This court decision should then be legally binding in all other jurisdictions, save perhaps for public policy issues, which may differ in various countries. Some amendments to the New York Convention would also be beneficial. The publication of case law under the New York Convention and international surveys, such as the IBA survey on public policy, will play an important role of greater certainty for parties.

"The great irony is that jurisdictions with the greatest need for foreign investment are also the jurisdictions where the local courts can be least friendly to foreign investors."

— Tom Sikora

Staines: Critics have identified a need to keep arbitration costs under control. Do you believe that parties are still struggling to manage the costs they incur during proceedings? What strategies can they adopt to reduce this burden? In your experience, how does that compare to litigation costs?

Kleiman: Managing costs with the aim of keeping them under control is a key concern of parties involved in arbitration proceedings. Costs associated with such proceedings depend on the arbitration institution which is chosen to administer the proceedings, the amount in dispute and the complexity of the case. In order to manage costs more efficiently, parties tend to request budgets in the form of fixed or capped fees to their counsel. As for administrative and arbitrators' fees, arbitral institutions such as the ICC provide for a cost calculator that enables the parties to produce an estimate of the likely costs of an ICC-administered arbitration. In response to parties' needs, arbitration institutions have adopted guidelines and rules to improve costs management.

Deane: International arbitration has the potential to be more efficient than court litigation, but that depends on the will of the parties, counsel and the tribunal to find ways to depart from conventional litigation practices. For example, one of the most significant sources of costs, and one of the most significant sources of delays, is extensive document production – much of which is never referenced in the briefs or at the hearing. To dispense with significant document production takes courage on the part of counsel, and on the part of the client, but it is likely one of the most significant ways to reduce the costs of the proceeding.

Acuner: Our recent experience shows that parties are struggling to manage costs. There are a number of strategies that parties can adopt to reduce this burden. One such strategy is to maintain a strict focus on the true issues in dispute between the parties. Well-considered bifurcation of issues can be helpful in this respect, particularly where the dispute may be disposed of by resolving one or more discrete issues. Proper management of the process is another important way of controlling costs. This involves, among other things, targeted requests for document production, careful consideration of what evidence –including in particular expert evidence – is strictly necessary, and close management of putting together the evidence which is deemed necessary.

Ford: Costs are a constant concern in arbitration. To my mind this is partly due to the flexible nature of arbitration and to party autonomy. Arbitrators do not feel they have the same authority to dictate proceedings as judges in courts. Agreement on non-core issues is always a strategy to reduce costs, as is limiting discovery, expert evidence, written submissions and hearing time. A lot of discipline, judgment and some courage is needed to make the decisions not to do things that might, but might not, change the outcome.

Ewerlöf: Cost issues are still on top of parties' minds when it comes to arbitration. However, I believe that the focus on costs for arbitrators and institutes, if applicable, is misconceived. Most of the costs in arbitration proceedings are related to counsel, evidence and the parties. An important measure to keep arbitration costs under control is to reduce the time of the arbitration proceedings. This may be done, for example, by a more stringent handling of the case by the tribunal from the outset and to increase the usage of cost sanctions against obstructing parties. The time issue is also important to bear in mind when comparing arbitration to litigation.

Sikora: Costs are indeed considerable. I have not seen a cost submission under seven figures in many years. Many larger cases now have cost submissions in eight figures. But the stakes in the arbitrations are indeed much higher than the costs and the expertise of the counsel, experts and tribunal members involved are tremendous. The vast majority of costs are party costs and not tribunal or institution costs. As such, the costs are to some degree self-inflicted. In the desire to win, we have created a world of multi-hundred page memorials supported by thousands of exhibits that the tribunal cannot possibly assimilate.

Venegas: Arbitration costs sometimes become the main obstacle for a successful proceeding. The best manner to manage these costs is to put a good budget system in place that will allow the interested party to have a clear picture of the overall cost of arbitration. In my experience, all of the major companies already have in place strict budget controls that allow them to avoid incurring any unforeseeable situation that may affect the continuity of an arbitration case.

"Expert witnesses can be very important in international arbitration proceedings, particularly with respect to complex issues of financial analysis or economic damages."

— Robert J. C. Deane

Staines: How do you envisage the international arbitration landscape unfolding over the coming years? Do you believe its importance as a mechanism for resolving commercial disputes is only set to increase?

Ford: Institutes and parties will continue to try and streamline procedures to reduce time and costs. I believe we are seeing now what we saw with the courts in the 1980s when case management was introduced; in Australia at least, judges became more active in controlling proceedings until ultimately the High Court held that case management was a valid consideration in making judicial decisions. The court's actions then were in part a reaction to the success of arbitration and other forms of ADR, and the general concern to reduce time and cost. Arbitration will continue to be important where we have parties from different countries who do not wish to submit to the courts of the other party and while enforcement of awards is perceived to be easier than enforcement of court judgments.

Venegas: In my opinion, arbitrations will increase, not only in number, but in sophistication and specialisation. If we consider 'arbitration' as an industry, then clearly it is 'coming of age' and, as has happened with other markets, it will grow, creating a number of specialised areas, such as construction arbitration, energy arbitration, pure contractual arbitration, corporate dispute arbitration, financial arbitration, and so on. This growth would only be successfully achieved if practitioners are up to the task and understand this trend of specialisation.

Deane: International arbitration is likely to continue increasing in importance over the coming years, as it is the only system of dispute resolution capable of functioning transnationally, and in a manner relevant to the global flow of capital and human resources. The real challenge for the arbitral community is to ensure that the ranks of counsel and arbitrators continue to be refreshed and expanded,

including by seeking to improve the diversity of the community in terms of gender, national origin and age. The field must constantly strive against exclusivity, and towards inclusion in all its facets, so it can maintain its position. It is also clear that many national court systems have recognised the value of some innovations of international arbitration, such as written direct evidence, attenuated document production and narrower hearings – and are seeking to incorporate these mechanisms into their own procedures, all of which will create some local competition in certain jurisdictions.

Ewerlöf: Certainly, the current discussion regarding ISDS may have an impact on the development of international arbitration. However, in my opinion there are no proper and serious alternatives to international arbitration. In order to maintain and increase international trade, which in my opinion is crucial, international arbitration will continue to play an increasingly important role in the future.

Acuner: I do believe that the importance of international arbitration is set to increase over the coming years. Parties value the control over the process that arbitration affords relative to litigation, including the power to appoint an arbitrator of their choice, who is familiar with the particular industry or area of expertise around which the dispute revolves. The main area in which reform may be needed is enforcement, which should be made easier. Parties are most concerned with having an enforceable award at the end of the process and the utility and efficiency of arbitration will be undermined unless obstacles to enforcement are tackled.

Kleiman: Debates which have surrounded the negotiation and conclusion of transnational free-trade agreements have undoubtedly increased collective awareness of both arbitration users and practitioners on the need to improve transparency and efficiency of the arbitration process. New guidelines, codes and rules have been published, notably by arbitration institutions, and are designed to address these key concerns. A better management of costs, time and potential conflicts of interest will increase the attractiveness and competitiveness of arbitration as a means to resolve international disputes.

Sikora: In an increasingly globalised world, international arbitration is not only here to stay but will continue to grow with the growth of transnational contracts. It will continue to develop and mature and address challenges as they come along. At this stage it is outgrowing the traditional pool of arbitrators who are struggling to keep up with demand for their services. However, I am confident that the pool of arbitrators will be appropriately expanded over time to meet the need of the ever growing case law.

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