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## CALL FOR PAPERS

# Center on International Commercial Arbitration Symposium on Salient Issues in International Commercial Arbitration

November 14, 2019

## INTERNATIONAL ARBITRATION IN TIMES OF ECONOMIC NATIONALISM

The Center on International Commercial Arbitration is pleased to invite submissions for its Biannual Symposium on Salient Issues in International Commercial Arbitration, to be held on November 14, 2019, at the American University Washington College of Law in Washington, D.C. The purpose of the conference is to highlight, develop, and promote scholarship in international arbitration. This symposium is organized with the institutional sponsorship of the German Arbitration Institute (DIS) in Bonn (Germany), the World Trade Institute in Bern (Switzerland), and the Externado University in Bogotá (Colombia).

### **About the Biannual Symposium**

The Symposium on Salient Issues in International Commercial Arbitration is organized biannually by the Center on International Commercial Arbitration. The

purpose to present a global perspective of current developments in international arbitration throughout the world. The symposium hosts prominent speakers and generates a dialogue about salient issues in international commercial arbitration, as well as current developments in BIT and ICSID arbitration, in the Americas, Europe, Africa, the Middle East, and East Asia.

### **Conference Subject Matter**

#### ***International Arbitration in Times of Economic Nationalism***

Submissions may include any original articles that analyze the trends, developments, and challenges in international arbitration in times of economic nationalism. Economic crises, financial volatility, social transformations, and political instability around the world have created a favorable environment for economic nationalism and other movements that may prove disruptive of the global economic world order that arose after the Cold War. International commercial and investment arbitration are particularly sensitive to such trends. For decades international arbitration professionals have advocated for the homogenization of regulations in international dispute settlement. The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards was seen as the epitome of a transnational arbitral order that could offer an efficient legal framework for unhindered international business. After 1990, international investment arbitration developed into the premier dispute settlement procedure for company-to-state disputes with growingly homogeneous, international obligations for the treatment of foreign direct investment.

Although these obligations and rules appear universal, they are being questioned—and sometimes torn down—by politicians, economists, and lawyers. This has already taken a toll on international arbitration.

In Europe, the European Court of Justice's *Achmea* decision in March 2018 has created shockwaves around the world. Some fear that this is the end of the international investment regime as we know it. The UNCITRAL has set up a Working Group to study alternatives and possible reforms to the international system of investment dispute settlement (ISDS).<sup>1</sup> Among the proposals discussed in that forum, as well as by the European Commission, are permanent investment courts, which may be much more exposed to interference from powerful states than the previous arbitral tribunals. The ICSID has responded to these proposals, and to other criticisms that exist in international investment arbitration, by announcing a revision of its rules of procedure<sup>2</sup>.

In the Middle East, international arbitration appears to be developing robustly. But

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<sup>1</sup> UNCITRAL Working Group III; more information available at [http://www.uncitral.org/uncitral/en/commission/working\\_groups/3Investor\\_State.html](http://www.uncitral.org/uncitral/en/commission/working_groups/3Investor_State.html).

<sup>2</sup> ICSID, web site on the ICSID Rule Amendment Process, available at <https://icsid.worldbank.org/en/amendments/Pages/About/about.aspx>.



some uncertainty remains, as the outcry about the 2016 UAE modification of Article 257 of the Penal Code shows. That provision allowed the local authorities to temporarily imprison arbitrators and other arbitration professionals in arbitrations seated in the UAE based on alleged violations of the duties of objectivity and integrity.<sup>3</sup> Although the provision was derogated in October 2018, the region still risks experiencing other sudden legal changes that would detract from the transnational efficiency of international arbitration.

In Latin America, the *Lava Jato* and *Odebrecht* corruption scandals caused backlash against domestic arbitration, especially in Peru. This situation became a fertile ground for even more government regulation and interference with arbitral tribunals. We still have to see how this will play out in regard to specific legislative measures. In addition, the distrust of domestic arbitration has led parties to ensure that their arbitration clauses only refer to arbitral institutions with excellent reputations. Argentina<sup>4</sup> and Uruguay<sup>5</sup> recently adopted new arbitration laws that follow the most modern and advanced standards as to procedure, judicial support, and recognition and enforcement of international awards. Brazil is already the country with the largest number of arbitrations in Latin America. Do these legal developments signal that the region will become increasingly friendly towards international arbitration, as the countries enter a more liberal political cycle?

In North America, the USMCA has set the tone for a United States that looks with distrust to the regime of international investment arbitration. USMCA's restrictive jurisdiction geared towards protecting US investors in Mexico appears to be a step back in history. This unidirectional approach of the investment tribunals' jurisdiction did not even exist in the ICSID Convention nor the BITs. When asked about his views on international arbitration during the negotiations that led to the USMCA, the United States Trade Representative Robert Lightizer said that he looks at investment arbitration as a "conservative and a 'sovereigntist.'"<sup>6</sup> Many governments around the world today probably share a similar view.

In Africa, state control over international arbitration has increased. For instance, the Ethiopian Supreme Court ruled in the *National Minerals* case in May 2018 that it had jurisdiction to hear an appeal against an arbitral award on error of law, even though the parties had explicitly excluded this possibility in their arbitration

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<sup>3</sup> Dalal Al Houti, Gloria Alvarez, and Zahra Rose Khawaja, "2018 In Review: The Middle East," Kluwer Arbitration Blog, February 3, 2019.

<sup>4</sup> Law on International Commercial Arbitration of the Republic of Argentina, Law No. 27449, adopted on July 4, 2018.

<sup>5</sup> Law on International Commercial Arbitration of the Republic of Uruguay, Law No. 19.636, adopted on July 13, 2018.

<sup>6</sup> Exchange between Congressman Kevin Brady and U.S. Trade Representative Robert Lightizer on ISDS at a House Ways and Means hearing on March 21, 2018, transcript available at <https://worldtradelaw.typepad.com/ielpblog/2018/03/brady-lightizer-isds-exchange.html>.



agreement.<sup>7</sup> In Tanzania, a recent change in law excluded public-private-partnerships (PPPs) from international arbitration, and instead subjected any dispute arising under a PPP to the country's courts of justice.<sup>8</sup>

In Asia, international arbitration is seen more and more often as a mechanism to protect Chinese companies doing business abroad, while the implementation of modern arbitration standards within mainland China remains sporadic. In fact, in June 2018 China established the first and second International Commercial Courts, to offer companies a court of justice as an alternative to arbitration.<sup>9</sup> Should this be interpreted as a sign that China wants to move away from arbitration, assume a stronger state control over dispute settlement, and curtail the growing use by Chinese companies of international arbitration?

These are just a few facts to illustrate that the evolution of international arbitration is neither lineal nor clearly foreseeable. Instead, it is a permanent dialectic between restricting forces—sometimes supported by broader nationalist movements— and globalist forces that advocate for the use of international arbitration as the *lingua franca* of dispute settlement. The international arbitration community, as well as other legal experts and economists, should critically assess the current status quo and the various options that lay ahead for international arbitration—both commercial and investment arbitration—if they want to stay ahead of the curve. We need answers to questions such as whether and to what extent arbitration efficiently settles today's business and investment disputes, or if there are "better" mechanisms. We need to ask if the procedural rules must be the same worldwide, or if international arbitration should accept local or national variations of important issues such as the responsibility of arbitrators, *ordre public*, formal requirements of arbitral awards as a precondition for enforcement, etc. These are questions that both scholars and practitioners need to critically assess and discuss in a common forum. This Symposium is such a forum.

### **Take Part in the Debate!**

This call for papers is open to scholars and practitioners alike with interest in international arbitration. All practitioners and scholars with this interest are welcome to apply, regardless of their nationality or origin, or the particular position or opinion they defend. This Symposium is aimed at being a forum of creative discussion to understand the current challenges international arbitration is facing, and to propose solutions that could solve some of the problems.

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<sup>7</sup> Sadaff Habib, "2018 In Review: A Tug of War for International Arbitration in Africa," *Kluwer Arbitration Blog*, January 17, 2019.

<sup>8</sup> *Ibid.*

<sup>9</sup> Li Huanzhi, "China's International Commercial Court: A Strong Competitor to Arbitration?," *Kluwer Arbitration Blog*, September 30, 2018.



### **Submission Instructions**

To submit a paper, the authors should email an attachment in Microsoft Word or PDF containing an abstract of between 300 and 600 words to [arbitration@wcl.american.edu](mailto:arbitration@wcl.american.edu). The deadline for submissions is August 15, 2019. Abstracts received thereafter will not be considered.

Abstracts should reflect original research that has not been published. Please include the author's name, title of the paper, institutional affiliation, contact information, and three to five keywords. Graduate students should identify themselves as such in the email.

It is also possible to formulate proposals for fully formed panels. Panels should be formulated around a common theme and include a confirmed list of panel members, abstracts for each presenter, and other required information. Please include the words "Panel Proposal" in the subject line of your email.

Each scholar may make only one submission. Both individual and co-authored submissions will be accepted. The Symposium's Program Committee will assign individual and co-authored submissions to thematic panels according to subject area.

### **Notification**

The authors of the selected proposals will be notified by Monday, September 2, 2019. The Symposium, where authors will present an advance draft of their paper, will take place on Thursday, November 14, 2019. There is no cost to register for the conference but participants are responsible for securing their own funding for travel, lodging, and other incidental expenses.

### **Submission of Final Papers**

The final papers, ready for publication, are due by December 15, 2019. This gives panelists the opportunity to include observations and comments received during the Symposium. Papers should number not less than 15, but not more than 30, pages, double spaced, in font Times New Roman size 12.

The final papers will be published as a hard copy in book format and in electronic format by the online journal *Transnational Dispute Management* (TDM), the media partner of this Symposium.

### **Symposium's Program Committee**

Dr. Horacio Grigera Naón, Director, Center on International Commercial Arbitration, AUWCL

Dr. Björn Arp, Fellow, Center on International Commercial Arbitration, AUWCL

Dr. José Manuel Azcárate, Professor of Law, Externado University of Bogotá

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