

# Recent trends in International Arbitration

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## Introduction

International arbitration has developed significantly during the last 80 years. The number of cross-border commercial contracts and international treaties containing arbitration clauses has exploded in the recent decades, leading to exponential growth in the number of international arbitrations.<sup>2</sup> The increased globalization of world trade and investment has resulted in increasingly harmonized arbitration practices around the world.<sup>3</sup> Many important instruments that support this harmonization and international arbitration in general have been created during the lifetime of the Board of Business Practice. These instruments include the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”) and the United Nations Commission on International Trade Law (“UNCITRAL”) Model Law on International Commercial Arbitration (the “UNCITRAL Model Law”), to give but a couple of examples. To date, the New York Convention has been ratified by 157 states, and legislation based on the UNCITRAL Model Law has been adopted in a total of 106 jurisdictions in 75 states.<sup>4</sup>

The growing popularity of arbitration is visible in Finland as well. Arbitration has long been the preferred method of resolving commercial disputes in Finland.<sup>5</sup> Established in 1911, the Arbitration Institute of the Finland Chamber of Commerce (the “FAI”) is one of the world’s oldest arbitral institutions. Finland also has an active arbitration community with an especially dynamic community of young practitioners.

In light of arbitration’s ever expanding role as a means of resolving international disputes, this article discusses certain recent trends in international arbitration. The aim is not to cover all hot topics in arbitration but rather to focus on four that have caught the authors’ attention in particular: transparency, third-party funding, financial institution arbitration, and diversity.



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<sup>1</sup> The views expressed in this article are strictly those of the authors and should not be attributed in any way to White & Case LLP.

<sup>2</sup> *Christopher R. Seppälä: Why Finland Should Adopt the UNCITRAL Model Law on International Commercial Arbitration*, *Liikejuridiikka* 3/2016, p. 190.

<sup>3</sup> *Nigel Blackaby, Constantine Partasides, et al.: Redfern and Hunter on International Arbitration*, Sixth Edition, Oxford University Press 2015, p. 1.

<sup>4</sup> UNCITRAL, *Status – UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006*, [http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998\\_Ebook.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf) (last visited 30 May 2017).

<sup>5</sup> *Mika Savola: Guide to the Finnish Arbitration Rules*, Kauppakamari 2015, p. 15.

# Recent trends in International Arbitration

## Transparency

### Transparency vs. Confidentiality

The Australian High Court's decision, *Esso Australia Resources Ltd. vs. Plowman*, from 1995, is often perceived as the milestone for opening the discussion about the status of confidentiality in international arbitration.<sup>6</sup> In its decision, the High Court of Australia refused to recognize confidentiality as an "essential attribute" of arbitration.<sup>7</sup> Over twenty years later, the right balance between confidentiality and transparency is still a heated topic and this discussion is likely to continue in the years to come.

Confidentiality, namely the ability of the parties to maintain all or parts of their proceedings among them and the arbitral tribunal, is generally considered to be one of the key benefits of arbitration.<sup>8</sup> However, it is also one of the main reasons that arbitration as a means of dispute resolution has come under attack. Indeed, the (perceived) lack of transparency, especially in the context of investor-state arbitration, has often been identified as the main cause for the general public's lack of confidence in arbitration, generating a so-called "legitimacy crisis" of arbitration.<sup>9</sup>

General public interest, predictability, and consistency in decision-making can be said to support a need for transparency in both investor-state arbitration and international commercial arbitration. More visible proceedings and transparent awards guarantee a higher level of predictability and consistency, which should, in turn, increase confidence in the process itself.<sup>10</sup> Proponents of more transparent proceedings also note that confidential proceedings may lead to inconsistency in awards related to disputes arising out of a same business transaction, which carries the risk of conflicting decisions.<sup>11</sup>

At the same time, many users of international arbitration, especially international businesses, still view confidentiality as an essential attribute of arbitration.<sup>12</sup> Confidentiality is perceived as encouraging efficient dispute resolution (as compared to emotive "trial by press release"), as reducing risks of disclosing sensitive business information to competitors, and as facilitating settlement.<sup>13</sup> Thus, some critics are afraid that steps towards transparency will undermine confidentiality and lead to a decline in the use of international arbitration. These diverging interests must, therefore, be balanced in the quest for transparency.

### Instruments Aimed at Increasing Transparency in Investor-State Arbitration

The shift towards transparency in investor-state arbitration has been mainly led by critics who perceive investor-state dispute settlement as happening before a "secret court", in which investors can challenge a country's laws or regulations if they are adverse to the interests of the private investor. In recent years, critics of investor-state dispute settlement have especially gained a foothold in connection with the debates surrounding the Transatlantic Trade and Investment Partnership and the Trans-Pacific Partnership.

Transparency provisions have become prevalent in modern free trade agreements and bilateral investment treaties.<sup>14</sup> Yet, many investors and international corporations are not keen on publishing their investor-state claims because of, among other reasons, the negative publicity that may surround those claims. The approach of states towards making their proceedings public also varies from one state to another.

UNCITRAL has in recent years created several instruments aimed at increasing transparency, especially in investor-state arbitration. Among those instruments are the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (the "UNCITRAL Transparency

6 *Esso Australia Resources Ltd. and others v. The Honourable Sidney James Plowman, The Minister for Energy and Minerals and others (1995) 193 CLR 10.*

The question before the court was whether a party to an arbitration, in this case a state-owned utility, could be obliged by a governmental regulator to disclose documents containing commercially-sensitive information produced in the arbitration by its adverse party. After a detailed analysis, the Australian High Court held that the party would not be restricted from disclosing to the Minister for Energy and Minerals information obtained in the course of arbitration.

7 For a case commentary see, for example, *The Hon. Andrew Rogers QC and Duncan Miller: Non-Confidential Arbitration Proceedings*, 12(3) *Arbitration International* 1996, pp. 319 – 346; *Gary B. Born: International Commercial Arbitration*, 2nd ed., 2014, pp. 2795 – 2797.

8 *Blackaby et al.* 2015, p. 123; *Born* 2014, p. 2779.

9 *Esmé Shirlow: Dawn of a new era? The UNCITRAL Rules and UN Convention on Transparency in Treaty-Based Investor-State Arbitration*, *ICSID Review* 2016, p. 622.

10 *Shirlow* 2016, p. 649.

11 *Stefano Azzali: Introduction*, in Alberto Malatesta and Rinaldo Sali (eds.), *The Rise of Transparency in International Arbitration*, 2013, p. xxv.

12 *Born* 2014, p. 2779; *Blackaby et al.* 2015, p. 29.

13 *Born* 2014, p. 2780.

14 *Julia Salasky and Corinne Montineri: Transparency in Investor-State Arbitration: the new UNCITRAL Rules on Transparency*, *Investment Policy Blog*, *Investment Policy Hub*, 26 March 2014, <http://investmentpolicyhub.unctad.org/Blog/Index/29> (last visited 30 May 2017).

# Recent trends in International Arbitration

Rules”), which are a set of procedural rules that provide for transparency and accessibility to the public of treaty-based investor-state arbitration.<sup>15</sup> The powerful tools set forth in the UNCITRAL Transparency Rules include publication of arbitral documents,<sup>16</sup> of *amicus curiae* submissions by third parties,<sup>17</sup> and of the opening of arbitral hearings.<sup>18</sup> But the UNCITRAL Transparency Rules also clearly define what is considered to be confidential or protected information.<sup>19</sup> Among such confidential or protected information is confidential business information,<sup>20</sup> information that is protected against being made public by the treaty or by law,<sup>21</sup> and information that would impede law enforcement.<sup>22</sup>

The UNCITRAL Transparency Rules came into effect on 1 April 2014. They apply to disputes arising out of treaties concluded on or after 1 April 2014, when the arbitration is initiated under the UNCITRAL Arbitration Rules, and unless the parties agree otherwise.<sup>23</sup> To date, the UNCITRAL Transparency Rules have been applied in two investor-state arbitrations, the first of which was *Iberdrola, S.A. (España) and Iberdrola Energia, S.A.U. vs. Bolivia*<sup>24</sup> and the second *BSG Resources Limited vs. Guinea*.<sup>25</sup>

The United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (the “Mauritius Convention”) is an instrument by which parties to investment treaties concluded before 1 April 2014 can express their consent to apply the UNCITRAL Transparency Rules to arbitrations arising out of these treaties in the future.<sup>26</sup> Pursuant to the Mauritius Convention, the signatory states can make

reservations as to the application of the Convention to a specific investment treaty.<sup>27</sup> The Mauritius Convention was opened for signature in March 2015 and will enter into force six months after the third country ratifies it.<sup>28</sup> To date, 18 countries have signed the Convention, but Mauritius and Canada are the only ones to have ratified it.<sup>29</sup> Thus, the Convention is not yet in force.

In addition to the UNCITRAL Transparency Rules and the Mauritius Convention, UNCITRAL provides a Transparency Registry. The Transparency Registry is a database for the publication of information and documents in treaty-based investor-state arbitration.<sup>30</sup> The Transparency Registry was established under the UNCITRAL Transparency Rules in order to make the documents produced in investor-state disputes available to the public.<sup>31</sup> To date, the Registry contains documents related to several disputes concerning the application of Chapter 11 of the North American Free Trade Agreement (*i.e.*, the chapter on investment protection) and short descriptions of the two investor-state arbitrations to which the UNCITRAL Transparency Rules apply (the related documents are made available on the websites of the arbitral institutions handling the cases, namely the International Centre for Settlement of Investment Disputes (the “ICSID”) and the Permanent Court of Arbitration (the “PCA”).

ICSID was for a long time a forerunner in transparency in investor-state arbitration.<sup>32</sup> ICSID cases are registered by the Secretariat and certain details, such as the names of the parties, the subject of dispute, and certain

15 UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, 16 December 2013 (entered into force 1 April 2014), [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/2014Transparency.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency.html) (last visited 30 May 2017).

16 The UNCITRAL Transparency Rules, Article 3.

17 The UNCITRAL Transparency Rules, Article 4.

18 The UNCITRAL Transparency Rules, Article 6.

19 The UNCITRAL Transparency Rules, Article 7.

20 The UNCITRAL Transparency Rules, Article 7(2)(a).

21 The UNCITRAL Transparency Rules, Article 7(2)(b) and 7(2)(c).

22 The UNCITRAL Transparency Rules, Article 7(2)(d).

23 The UNCITRAL Transparency Rules, Article 1.

24 1. *Iberdrola, S.A. (España)* 2. *Iberdrola Energia, S.A.U. (España) v. El Estado Plurinacional de Bolivia*, PCA Case No. 2015-05.

25 *BSG Resources Limited, BSG Resources (Guinea) Limited and BSG Resources (Guinea) SARL v. Republic of Guinea*, (2016).

26 UNCITRAL, United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, New York 2014 (the “Mauritius Convention”), [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/2014Transparency\\_Convention.html?lf=100&lng=en](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention.html?lf=100&lng=en) (last visited 30 May 2017).

27 The Mauritius Convention, Article 3.

28 The Mauritius Convention, Article 9.

29 UNCITRAL, Status of United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, New York 2014, [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/2014Transparency\\_Convention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention_status.html) (last visited 30 May 2017).

30 UNCITRAL, Transparency Registry, <http://www.uncitral.org/transparency-registry/registry/index.jsp#country> (last visited 30 May 2017).

31 UNCITRAL, United Nations Establishes Transparency Registry in Vienna, 1 April 2014, <http://www.unis.unvienna.org/unis/en/pressrels/2014/unis197.html> (last visited 30 May 2017); The UNCITRAL Transparency Rules, Article 8.

32 *Loretta Malintoppi and Natalie Limbasan*: Living in Glass Houses? The Debate on Transparency in International Investment Arbitration, BCDR International Arbitration Review 2015, p. 31.

# Recent trends in International Arbitration

procedural details, as well as ICSID awards, are frequently published on the ICSID website.<sup>33</sup> In addition, ICSID has live-streamed hearings in investor-state disputes for several years.<sup>34</sup> Pursuant to Article 48(4) of the Arbitration Rules of the ICSID, publication of awards is subject to the consent of the parties.<sup>35</sup>

The PCA also maintains a case repository that contains details of investor-state proceedings conducted under the auspices of the PCA.<sup>36</sup> Hearings of certain cases handled by the PCA have also been video-archived in their case repository.<sup>37</sup>

Other arbitral institutions have also taken steps towards a greater degree of transparency in investor-state arbitrations. On 30 December 2016, the Singapore International Arbitration Centre (the "SIAC") announced its official release of the first edition of its Investment Arbitration Rules (the "SIAC Investment Arbitration Rules"), which entered into force on 1 January 2017. Under these rules, SIAC may publish some information about the investor-state arbitration proceedings even without the parties' express consent.<sup>38</sup> However, the information that can be published without the parties' express consent is limited to certain key details, such as the nationality of the parties and of the tribunal members, the date of commencement of the proceedings, and whether the proceedings are ongoing or terminated.<sup>39</sup> SIAC may also publish without the parties' express consent redacted excerpts of the reasoning of the tribunal, as well as of the decisions by the SIAC Court on challenges of arbitrators.<sup>40</sup>

Various non-governmental organizations have long advocated for more transparent mechanisms for dispute settlement, including access to information and public participation in

proceedings.<sup>41</sup> These actors have greeted the trend towards more transparent investor-state arbitration with open arms. But concerns around the increased transparency of investor-state arbitrations remain: in the words of one arbitration practitioner, "[...] the same considerations that counsel in favor of confidentiality in forming investor-state agreements – building trust and objectivity, preserving commercial and other confidences, facilitating the negotiation process, avoiding inflammation of emotions – also counsel in favor of confidentiality in the dispute resolution context".<sup>42</sup> Therefore, it must be ensured that the instruments aimed at increasing transparency focus on the legitimate objective of informing the public rather than offer a way to develop leverage for settlement discussions regarding the underlying dispute.<sup>43</sup>

## Transparency in International Commercial Arbitration

### Increased Demand for Transparency in International Commercial Arbitration

The lively debate around transparency in investor-state arbitration has gained momentum in the world of international commercial arbitration more recently. Some scholars seem to be of the opinion that transparency is an important feature in investor-state disputes but does not automatically suit commercial arbitration.<sup>44</sup> This opinion seems to result from the traditional view that private relationships, such as the relationship between two companies, mean private disputes.<sup>45</sup> However, one can argue that a number of reasons militate against this dichotomy.<sup>46</sup>

Any increased demand for transparency in international commercial activities naturally increases the need for

33 International Centre for Settlement of Investment Disputes, Cases, <https://icsid.worldbank.org/en/Pages/cases/searchcases.aspx> (last visited 30 May 2017).

34 The ICSID live-streamed a hearing for the first time in May 2010 in *Pac Rim Rayman LLC v. Republic of El Salvador*. Sofia Plagakis: Webcasting. A tool to increase transparency in judicial proceedings, in Junji Nakagawa (ed.) *Transparency in International Trade and Investment Dispute Settlement* (2010), p. 84.

35 Rules of Procedure for Arbitration Proceedings (the Arbitration Rules) of ICSID, Rule 48(4) (entered into force 10 April 2006).

36 Permanent Court of Arbitration, PCA Case Repository, <https://pcacases.com/web/> (last visited 30 May 2017).

37 See, e.g., *Mesa Power Group LLC (USA) v. Government of Canada or Windstream Energy LLC (U.S.A.) v. The Government of Canada*, <https://pcacases.com/web/allcases/> (last visited 30 May 2017).

38 The SIAC Investment Arbitration Rules, Rule 38.1.

39 The SIAC Investment Arbitration Rules, Rule 38.2.

40 Ibid.

41 Center for International Environmental Law, *Webcasting as a Tool to Increase Transparency in Dispute Settlement Proceedings*, 2010, p. 13, [http://www.ciel.org/wp-content/uploads/2015/04/Webcasting\\_21Jun10.pdf](http://www.ciel.org/wp-content/uploads/2015/04/Webcasting_21Jun10.pdf) (last visited 30 May 2017).

42 *Born* 2014, p. 2831.

43 See, *Born* 2014, p. 2831.

44 See, *Bernardo M. Cremades and Rodrigo Cortes: The Principle of Confidentiality in Arbitration: A Necessary Crisis*, *Journal of Arbitration Studies* 2013, pp. 25, 27 and 30.

45 *Cremades and Cortes* 2013, p. 25.

46 See, e.g., *Born* 2014, pp. 2828 – 2831; *Cremades and Cortes*, 2013, p. 27.

# Recent trends in International Arbitration

transparency in international commercial arbitration.<sup>47</sup> This is particularly true with respect to publicly traded companies, who have reporting duties towards their shareholders and the markets, as well as in particularly sensitive fields, where interests beyond those of the two parties at dispute are at stake. Parties to commercial arbitrations also demand more visibility as to the decision-making of arbitral institutions to be better equipped to make strategic decisions regarding their own disputes. These views have recently led to a greater degree of openness in international commercial arbitration, and this trend is likely to continue.

## Data Published by the Institutions

In response to growing user demand for transparency,<sup>48</sup> arbitral institutions have recently started to publish more data about the cases they handle.

In 2016, the International Chamber of Commerce (the “ICC”) started to publish on its website the names of the arbitrators appointed to ICC cases, their nationality, their role within the tribunal, as well as whether the appointment was made by the International Court of Arbitration of the ICC (the “ICC Court”) or by the parties.<sup>49</sup> The parties can, by mutual agreement, opt out from this limited disclosure<sup>50</sup> or they may request the ICC Court to publish additional information about their case.<sup>51</sup>

Another step that the ICC has taken towards transparency can be found in the amendments to the ICC Arbitration Rules that entered into force on 1 March 2017. Under those rules, any party can request the ICC Court to provide reasons for its decisions as to the appointment, confirmation, challenge or replacement of an arbitrator. Under the 2012 version of the ICC Arbitration Rules, reasons for such decisions were not communicated.<sup>52</sup>

Other institutions have taken a similar path. For example, the London Court of International Arbitration (the “LCIA”) publishes a comprehensive analysis of cases in order to provide users with information on the average costs and duration of arbitrations.<sup>53</sup> In February 2016, the Arbitration Institute of the Stockholm Chamber of Commerce (the “SCC”) published a report detailing the size of disputes it administers, their length and costs, and how tribunals have allocated the costs of arbitration and the costs for legal representation.<sup>54</sup> The FAI publishes data regarding the average duration of arbitral proceedings but does not publish information regarding the costs or the arbitrators (except for the percentage of female arbitrators appointed by the FAI).<sup>55</sup>

This type of data should help the parties to make decisions related to their disputes. For example, the duration of a dispute is critical to many parties due to its financial impact and its impact on a possibly ongoing project or commercial relationship. Moreover, as explained in the ICC Note to the Parties and Arbitral Tribunals on the Conduct of Arbitration: “[t]ransparency provides greater confidence in the arbitration process, and helps protect arbitration against inaccurate or ill-informed criticism”.<sup>56</sup> Thus, the positive impact of this trend is not limited to frequent users of arbitration.

There are, however, concerns that surround publication of case-related data – in particular from the arbitrators’ perspective. Many of the factors, such as the duration of arbitral proceedings, are highly dependent on the specific merits of each case and the conduct and availability of counsel and the parties.

Thus, drawing conclusions on arbitrators’ capabilities or efficiency based on a very limited amount of information understandably raises concerns among some within the arbitration community.

47 *Cremades and Cortes* 2013, p. 27.

48 In the 2015 Queen Mary and White & Case International Arbitration Survey, the interviewees expressed a strong interest in institutions publishing data to assist the users in making informed choices. Queen Mary University of London, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration*, 2015, p. 22, <https://www.whitecase.com/publications/insight/2015-international-arbitration-survey-improvements-and-innovations> (last visited 30 May 2017).

49 See, <https://iccwbo.org/dispute-resolution-services/arbitration/icc-arbitral-tribunals/> (last visited 30 May 2017).

50 ICC, Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration Under the ICC Rules of Arbitration, 1 March 2017 (“ICC Note to Parties and Arbitral Tribunals 2017”) <https://cdn.iccwbo.org/content/uploads/sites/3/2017/03/ICC-Note-to-Parties-and-Arbitral-Tribunals-on-the-Conduct-of-Arbitration.pdf> (last visited 30 May 2017), para 28.

51 ICC Note to Parties and Arbitral Tribunals 2017, para 31.

52 ICC Arbitration Rules 2012, Article 11(4).

53 LCIA, Tools to Facilitate Smart and Informed Choices, 3 November 2015, <http://www.lcia.org/News/lcia-releases-costs-and-duration-data.aspx> (last visited 30 May 2017).

54 *Celeste E. Salinas Quero*: Costs of arbitration and apportionment of costs under the SCC Rules, SCC Institute, February 2016, [http://sccinstitute.com/media/93440/costs-of-arbitration\\_scc-report\\_2016.pdf](http://sccinstitute.com/media/93440/costs-of-arbitration_scc-report_2016.pdf) (last visited 30 May 2017).

55 The Finland Arbitration Institute, Statistics, <http://arbitration.fi/the-arbitration-institute/statistics/> (last visited 30 May 2017).

56 ICC Note to Parties and Arbitral Tribunals 2017, para 27.

# Recent trends in International Arbitration

## Publication of Awards

Even though in most commercial arbitrations all or at least most of the data remains confidential throughout the proceedings, arbitral institutions may publish the awards, or extracts of them, after the matter has been resolved. Such publication is typically in redacted form. The practices in this regard vary from one institution to another. For instance, certain institutions, such as the ICC, publish selected awards in redacted form, while others, such as the Hong Kong International Arbitration Centre (the "HKIAC"), do not generally publish awards.

The institutions that publish arbitral awards differ as to whether the parties' consent is needed for the publication of the redacted award or not. The ICC publishes awards in redacted form without the parties' consent and without a specific rule stating so. However, the ICC has explained that, in practice, it would not publish an award if doing so would be contrary to a confidentiality agreement between the parties.<sup>57</sup> The FAI may also publish redacted awards without the parties' express consent, but the parties can opt out of publication.<sup>58</sup> A different approach is taken by, for example, the SIAC. The SIAC Arbitration Rules state that the parties' and the arbitral tribunal's consent is required for publication of redacted awards.<sup>59</sup>

Several arguments support publication of awards even without the parties' consent. Publication of awards gives existing and potential users of arbitration broader visibility of the arbitrators' work. This could strengthen the legitimacy of arbitration and promote arbitration as a dispute resolution method against the allegations of arbitration being a secret club. Publication of arbitral awards could have positive effects on the quality and speed of decision-making, because the arbitrators would be aware that the quality and timing of their decisions would be subject to public scrutiny.<sup>60</sup>

Development of case law is another important argument that supports publication of awards,<sup>61</sup> in particular as certain types of disputes tend to go mainly to arbitration. It can be said that keeping the awards confidential deprives the users of arbitration from the (usually highly qualified) arbitrators' reasoning and, thus, slows down the progress of law. It also leaves the responsibility for developing case law solely to ordinary courts who are not always the best placed – either in terms of their resources or the background and experience of the judges – to lead the development of law in the field of international commercial relations.<sup>62</sup> Further, arbitrators decide quasi-exclusively certain complex questions, such as privilege in international arbitration or document disclosure. Yet, national laws do not necessarily offer much guidance to arbitral tribunals in their regard and, even where they do, disparity of national regimes may lead to different outcomes. Reaching an international consensus on the law applicable to these questions or on transnational rules that govern them requires visibility of arbitral tribunals' decision-making. This visibility could be achieved by publishing arbitral awards.

Despite the undeniable benefits of publishing parts or the entirety of the awards, various arguments favor requiring party consent for the publication of awards. First, some argue that the concerns of the users of arbitration should take precedence over the need for development of jurisprudence in commercial law.<sup>63</sup> Second, sometimes it is difficult to redact the award without allowing other industry players to discern the parties to the dispute.<sup>64</sup> Third, the utility of the publication of awards has also been challenged. For instance, the perceived contribution to the development of common law in international arbitration has been questioned due to arbitral awards' non-binding nature as precedents.<sup>65</sup> Finally, from the arbitrators' point of view, there is a risk that publication of their awards will lead to the public drawing generalized conclusions

57 New York City Bar, Report by the Committee on International Commercial Disputes, February 2014, p. 9,

<http://www2.nycbar.org/pdf/report/uploads/20072645-PublicationofInternationalArbitrationAwardsandDecisions.pdf> (last visited 30 May 2017).

58 Pursuant to the FAI Arbitration Rules, "[u]nless otherwise agreed by the parties, the Institute may publish excerpts or summaries of selected awards, orders and other decisions, provided that all references to the parties' names and other identifying details are deleted." Arbitration Rules of the Finland Chamber of Commerce, 16 May 2013, Section 49(4) (entered into force 1 June 2013).

59 SIAC Investment Arbitration Rules, 30 December 2016, Section 32.12. (entered into force 18 January 2017).

60 *Born* 2014, p. 2821.

61 *Azzali* 2013, p. xxix.

62 *Cremades and Cortes* 2013, p. 35; *Kent Phillips and Benson Lim*: SIAC's Retreat From Publication of Awards Without Consent Strikes The Right Balance, Kluwer Arbitration Blog, 5 October 2016, <http://kluwerarbitrationblog.com/2016/10/05/siacs-retreat-from-publication-of-awards-without-consent-strikes-the-right-balance/> (last visited 30 May 2017).

63 *Phillips and Lim* 2016.

64 *Ibid.*

65 *Ibid.*

# Recent trends in International Arbitration

on their positions with respect to certain questions, without taking into account the case-specific issues. This could arguably lead to arbitrators not being willing to accept appointments in certain types of disputes to avoid the potential impact on their future appointments.

Despite the differences in views, most arbitration practitioners seem to agree that there are undeniable benefits to the publication of awards in some form. Thus, at least when the parties have expressly consented to the publication of their award, there seems to be no reason not to do so – provided that certain information is carefully redacted if the parties so wish. And, even absent the parties' consent, the arbitration community would benefit from at least sanitized versions of the dispositive parts of the awards being published, in particular with respect to questions that rarely go to national courts.

## Instruments Aimed at Increasing Transparency in Arbitrator Selection

In addition to arbitral institutions' efforts in publishing data about arbitrator appointments (see above), a tool is in the process of being set up relating to information about arbitrators.

Arbitrator Intelligence is a project aiming at promoting transparency, fairness, and accountability in the selection of international arbitrators, and facilitating increased diversity in arbitrator appointments.<sup>66</sup> Arbitrator Intelligence has developed and implemented an "Arbitrator Intelligence Questionnaire", which is a feedback questionnaire designed to facilitate systematic collection of information about arbitrators' case management and decision-making.<sup>67</sup> It also collects published and unpublished awards and procedural orders, which provide information about arbitrators' past decision-making. Arbitrator Intelligence is still in development, but once fully developed, its stated objective is to be a non-profit, interactive informational network that

increases and equalizes access to critical information in the arbitrator selection process.<sup>68</sup> It will be interesting to see how this initiative develops.

## Third-Party Funding

### Development of Third-Party Funding of Arbitration

Arguably,<sup>69</sup> the commercial litigation funding industry has existed for over 30 years in Australia, for more than 15 years in Germany and the United Kingdom, and for around 10 years in the United States.<sup>70</sup> The phenomenon seems to be more recent in the field of international arbitration, although no publicly available data appears to exist on the first ever third-party funded arbitration proceeding. It has been said that 2014 was the year in which third-party funding of arbitration really "hit the headlines and came to the forefront of the arbitration community".<sup>71</sup> Based on the amount of articles and blogposts written about the topic in recent years, together with the increasing number of conferences discussing third-party funding, this statement seems roughly accurate.

Although there is no unanimous definition of "third-party funding of arbitration", the term is most often used to describe a situation where a third party that has no pre-existing interest in the dispute provides capital for a party's – most often the claimant's – costs associated with pursuing the arbitration, in return for a share of the proceeds if the case is won.<sup>72</sup> If the funded party loses the arbitration proceedings, the funder loses its investment.<sup>73</sup> The funding arrangement itself can take various shapes. It can, for example, be built as a success-based legal fee arrangement, a legal expenses insurance, sale and assignment of claims, a loan provided by a bank or other lenders, or a corporate finance instrument.<sup>74</sup> The most common form of third-party funding in international arbitration seems to be non-recourse financing with repayment contingent on success.<sup>75</sup>

66 Arbitrator Intelligence, <http://www.arbitratorintelligence.org/> (last visited 30 May 2017).

67 Arbitrator Intelligence, AIQ Frequently Asked Questions, <http://www.arbitratorintelligence.org/aiq-frequently-asked-questions/> (last visited 30 May 2017).

68 Arbitrator Intelligence, About Arbitrator Intelligence, <http://www.arbitratorintelligence.org/about/> (last visited 30 May 2017).

69 According to Victoria Shannon and Lisa Bench Nieuwveld, there is some debate about the exact start of third-party funding. *Victoria Shannon and Lisa Bench Nieuwveld: Third-Party Funding in International Arbitration*, Wolters Kluwer 2012, p. 11.

70 *Ibid*; *Selvyn Seidel: Investing in International Arbitration Claims – Burford Group*, Iberian Lawyer, <http://www.iberianlawyer.com/legal-updates-ii/litigation-adr/3439-investing-in-international-arbitration-claims-> (last visited 30 May 2017).

71 *Marie Stoyanov and Olga Owczarek: Third-Party Funding in International Arbitration: Is it Time for Some Soft Rules?*, BCDR International Arbitration Review 2015, p. 171.

72 *Jonas von Goeler: Third-Party Funding in International Arbitration and its Impact on Procedure*, Kluwer Law International 2016, p. 1; *Stoyanov* 2015, p. 172.

73 *Von Goeler* 2016, p. 1.

74 *Ibid*.

75 *Shannon* 2012, p. 8.

# Recent trends in International Arbitration

Third-party funding was originally designed to support parties that would not have otherwise had the resources to protect their rights under an agreement.<sup>76</sup> Thus, the original aim of third-party funding – which it still serves to a certain extent – was to protect the parties' access to justice. It also levels the playing field if one party has significantly more financial resources than the other. Third-party funding has, however, departed from its original purpose in several respects. Today, third-party funding is not used only to palliate one side's lack of financial resources. On the contrary, users of today's third-party funding include parties with significant means who view third-party funding as a financing tool and a way to mitigate costs.<sup>77</sup>

## Issues of Concern

As the use of third-party funding has increased<sup>78</sup> and the market developed, the range and sophistication of funding products and structures has broadened. In recent years, institutional specialty providers of capital for dispute resolution have entered the market for large-scale, high value international arbitration disputes.<sup>79</sup> This has led to certain voices of concern being raised among the users (and critics) of arbitration.

First, a third-party funder is not party to the arbitration agreement between the parties to the arbitration. Yet, it has a significant economic interest in the outcome of the case. Some critics claim that this discrepancy between arbitral consent and economic involvement might alter the dynamics of the arbitral proceedings, affect the procedural rights and interests of the parties, and thereby modify the ordinary course of the proceedings.<sup>80</sup> This is particularly true when the funder does not undertake to pay any costs award should the claim fail. In such circumstances, a claimant that lacks sufficient resources to pay for its own costs will be facing

a costs award after having lost its case, which award it will unlikely be able to pay. This scenario is particularly concerning in the field of investment arbitration, as an investor that is unable to pay the costs to the state could leave the taxpayers responsible for the state's legal fees incurred in defending itself against a meritless claim.<sup>81</sup>

A second concern that some critics have raised is that third-party funding could increase the risk of frivolous claims, which would be especially worrisome in investment arbitration. This concern may, however, have little ground in reality as, due to the significant costs involved in third-party funding, the funders usually carefully assess the merits of a claim before agreeing to fund it.<sup>82</sup>

A third concern that is typically raised is that of potential conflicts of interest. As mentioned, the funder will have a significant interest in the outcome of the arbitration. Therefore, a conflict of interest between the arbitrator and the third-party funder could lead to serious consequences, such as the challenge of the arbitrator or the award.<sup>83</sup>

Due to these concerns, the demand for more regulation regarding the use of third-party funding of arbitration is growing. Many commentators have suggested that a general obligation to disclose the existence of third-party funding should be added to national legislations and arbitration rules in order to allow the arbitrators to make any necessary disclosures on potential conflicts of interest or to order security for costs.<sup>84</sup> Indeed, the ordering of security for costs has been flagged as a possible solution to an insolvent claimant bringing a claim with the aid of third-party funding,<sup>85</sup> but a tribunal can order such security only if it is aware of the funding arrangement. Views on these matters remain hotly debated in the arbitration community.

76 Stoyanov 2015, p. 172.

77 Ibid.

78 According to the statistics of one funder, at least 60 percent of all ICSID cases enquired about (but not necessarily sought or obtained) third party funding. ICCA, Third-Party Funding, [http://www.arbitration-icca.org/projects/Third\\_Party\\_Funding.html](http://www.arbitration-icca.org/projects/Third_Party_Funding.html) (last visited 30 May 2017).

79 Von Goeler 2016, p. 1.

80 Von Goeler 2016, p. 5.

81 Derric Yeoh: Third Party Funding in International Arbitration: A Slippery Slope or Levelling the Playing Field?, p. 116, 33(1) Journal of International Arbitration 2016, pp. 115 – 122.

82 Ibid.

83 Burcu Osmanoglu: Third-Party Funding in International Commercial Arbitration and Arbitrator Conflict of Interest, Journal of International Arbitration 2015, p. 327.

84 Osmanoglu 2015, p. 348; Nadia Darwazeh and Adrien Leleu: Disclosure and Security for Costs or How to Address Imbalances Created by Third-Party Funding, p. 145, 33(2) Journal of International Arbitration 2016, pp. 125 – 149.

85 For example, Born states that "[w]here a party appears to lack assets to satisfy a final costs award, but is pursuing claims in an arbitration with the funding of a third-party, then a strong prima facie case for security for costs exists." Born 2014, p. 2494. However, the findings of the ICCA-Queen Mary Task Force underlined that "third-party funding arrangements in and of itself is not sufficient indication that a claimant is impecunious and therefore the mere existence of a third-party agreement is not sufficient reason for a tribunal to order security for costs." Stavros Brekoulakis: The Impact of Third Party Funding on Allocation for Costs and Security for Costs Applications: The ICCA-Queen Mary Task Force Report, 18 February 2016, Kluwer Arbitration Blog, <http://kluwerarbitrationblog.com/2016/02/18/the-impact-of-third-party-funding-on-allocation-for-costs-and-security-for-costs-applications-the-icca-queen-mary-task-force-report/> (last visited 30 May 2017).



# Recent trends in International Arbitration

## Regulation of Third-Party Funding

### Third-Party Funding in Arbitration Rules and Soft Law

The number of different rules or other soft law instruments addressing third-party funding of arbitration remains modest. The 2014 IBA Guidelines for Conflicts of Interest were the first rules to specifically address third-party funding. The fundamental principle underlying the IBA Guidelines on Conflicts of Interest is that each arbitrator must be impartial and independent of the parties to the arbitration.<sup>86</sup> Pursuant to General Standard 6(b) of the Guidelines: “[i]f one of the parties is a legal entity, any legal or physical person having a controlling influence on the legal entity, *or a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration*, may be considered to bear the identity of such party.”<sup>87</sup> [emphasis added] The explanation to General Standard 6(b) clarifies that: “[t]hird-party funders and insurers in relation to the dispute may have a direct economic interest in the award, and as such may be considered to be the equivalent of the party”.<sup>88</sup> Thus, an arbitrator should also be impartial and independent of the third-party funder.

Pursuant to General Standard 7 of the IBA Guidelines on Conflicts of Interest, it is the funded party’s duty to inform the arbitrator, the arbitral tribunal, the other parties and the arbitral institution of any relationship between the arbitrator and “[...] any person or entity with a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration”.<sup>89</sup> The explanation to General Standard 7(a) clarifies that: “[t]he parties’ duty of disclosure of any relationship, [...] has been extended to relationships with persons or entities having a direct economic interest in the award to be rendered in the arbitration, *such as an entity providing funding for the arbitration*, or having a duty to indemnify a party for the award.”<sup>90</sup> [emphasis added]

The ICC Guidance Note for the disclosure of conflicts by arbitrators states that, when evaluating whether to make a disclosure, the arbitrators should consider “relationships with any entity having a direct economic interest in the dispute or an obligation to indemnify a party for the award.”<sup>91</sup> This definition of third-party funding follows, word for word, the definition of third-party funding set out in the IBA Guidelines on Conflicts of Interest.

In 2014, the International Council for Commercial Arbitration and Queen Mary University of London jointly created a Task Force on Third-Party Funding in International Arbitration (the “ICCA-Queen Mary Task Force”). The ICCA-Queen Mary Task Force’s aim is to systematically study and make recommendations regarding the procedures, ethics, and related policy issues relating to third-party funding in international arbitration. A working draft of the ICCA-Queen Mary Task Force’s report on the use of third-party funding was presented, for discussion purposes, at the 14th Annual ITA-ASIL Conference on Third-Party funding, held in Washington, DC on 12 April 2017.<sup>92</sup> The full report has not yet been published.

### Third-Party Funding in National Legislation

Up until the beginning of 2017, no national legislation contained express provisions regarding third-party funding of arbitration. Yet, regulation of third-party funding seems to be gaining importance among the factors affecting the choice of a seat.<sup>93</sup>

For example, third-party funding of arbitration at a seat where third-party funding is illegal causes several risks to the funded party. If the funded party is the claimant, the respondent may seek to injunct the arbitration on the basis that the claimant is in abuse of process or sue the claimant in tort for abuse of process or champerty and maintenance.<sup>94</sup> The courts of

86 General Standard 1 of the IBA Guidelines on Conflicts of Interest: “Every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so until the final award has been rendered or the proceedings have otherwise finally terminated”; International Bar Association, *IBA Guidelines on Conflicts of Interest in International Arbitration*, 2014 (“IBA Guidelines 2014”), p. 4.

87 IBA Guidelines 2014, p. 13.

88 IBA Guidelines 2014, p. 14.

89 IBA Guidelines 2014, p. 15.

90 IBA Guidelines 2014, p. 16.

91 ICC Note to Parties and Arbitral Tribunals 2017, p. 6.

92 For a description of certain findings of the report, see *James Egerton Vernon: Taming the “Mercantile Adventurers”*: Third Party Funding and Investment Arbitration – A Report from the 14th Annual ITA-ASIL Conference, Kluwer Arbitration Blog, 21 April 2017, <http://kluwerarbitrationblog.com/2017/04/21/taming-the-mercantile-adventurers-third-party-funding-and-investment-arbitration-a-report-from-the-14th-annual-ita-asil-conference/> (last visited 30 May 2017).

93 *Kabir Singh, Sam Luttrell and Elan Krishna: Third-party funding and arbitration law-making: the race for regulation in the Asia-Pacific*, Kluwer Arbitration Blog, 14 July 2016, <http://kluwerarbitrationblog.com/2016/07/14/third-party-funding-and-arbitration-law-making-the-race-for-regulation-in-the-asia-pacific/> (last visited 30 May 2017).

94 *Ibid.*

# Recent trends in International Arbitration

the seat could also decline to assist the funded party due to the illegal funding arrangement. If the funded party prevails, the other party could also seek to set aside the award on the basis of the award offending public policy.<sup>95</sup> The funder also faces the risk of not being able to enforce its rights under the funding agreement, if the funded party's assets are located in a jurisdiction that is not favourable to third-party funding.<sup>96</sup> Experienced arbitration practitioners are aware of these risks. Therefore, if they have a client that needs third-party funding, they will most likely advise the client to choose a seat at which such funding is either expressly allowed or at least not forbidden.<sup>97</sup> Legislation of third-party funding can also be a way for a seat to compete for a greater share of international arbitration proceedings.<sup>98</sup>

Singapore and Hong Kong have actively sought ways to attract international arbitrations, and their responsiveness to users' demands seems to have borne fruit: in the 2015 International Arbitration Survey, both were listed among the five most preferred and widely used seats,<sup>99</sup> contrary to 2010 when neither of them figured on the list of preferred seats.<sup>100</sup> Thus, it comes as no surprise that both countries are among the first ones to amend their legislation to allow third-party funding. The Singapore Parliament passed a bill allowing for third-party funding in January 2017, and a similar Hong Kong bill is currently under review.

## Disclosure of Third-Party Funding

### Disclosure of Third-Party Funding in International Commercial Arbitration

In international commercial arbitration, the funded party generally has no obligation to disclose its funding arrangement. Indeed, at the time of writing, there is no duty to disclose third-party funding under any arbitration rules or national laws other than the amended Legal Profession

(Professional Conduct) Rules of Singapore. Hong Kong is also contemplating a reform of its national law, including a general disclosure obligation of third-party funding.

Disclosure of third-party funding is required by virtue of certain general disclosure obligations in international arbitration, which are not specifically targeted at third-party funding but encompass such arrangements all the same. As described above, IBA Guidelines on Conflicts of Interest in International Arbitration address the disclosure of third-party funding in connection with arbitrator impartiality and independence. The third-party funding agreement may also need to be produced under general standards governing document production, in particular if the arbitral tribunal is called to decide on cost related issues, such as the security for or allocation of costs.<sup>101</sup>

The demand for greater transparency regarding parties' funding arrangements is growing although the topic remains debated.<sup>102</sup> There is no consensus on whether a general disclosure obligation should exist or on the modalities of any such disclosure. Most supporters of a general obligation to disclose third-party funding argue that such an obligation is required to tackle the potential imbalances and other problems created by third-party funding.<sup>103</sup> But opponents consider that imposing a general duty to disclose third-party funding is "both unworkable and unnecessary"<sup>104</sup> and that existing general disclosure rules and international arbitration practices address the disclosure of third-party funding in a sufficient manner.<sup>105</sup>

Several questions arise in connection with a general disclosure obligation. One of the most discussed ones is whether disclosure of the existence of a funding arrangement is sufficient or whether the disclosure obligation should extend to the content of the funding agreement. Other questions that need to be addressed if a general disclosure obligation is

95 Ibid.

96 Ibid.

97 Ibid.

98 Ibid.

99 Queen Mary, 2015 International Arbitration Survey, p. 2.

100 Queen Mary University of London, *2010 International Arbitration Survey: Choices in International Arbitration*, 2010, p. 2, <http://www.arbitration.qmul.ac.uk/docs/123290.pdf> (last visited 30 May 2017).

101 *Von Goeler* 2016, p. 132.

102 *Von Goeler* 2016, p. 140.

103 *Darwazeh and Leleu* 2016, p. 145.

104 *Von Goeler* 2016, p. 150.

105 *Von Goeler* 2016, pp. 149 – 159.

# Recent trends in International Arbitration

imposed include what types of funding arrangements should be disclosed; to whom must the disclosure be made; when should the disclosure be made; and who should be the one to impose a general duty to disclose third-party funding.<sup>106</sup> The funding agreement may also contain a confidentiality and/or non-disclosure clause, in which case the conflict between the clause and the disclosure obligation must somehow be resolved, either by the party itself or the arbitral tribunal. Thus, if a general disclosure obligation is imposed, it must be carefully thought through in order to avoid lengthy and complicated procedural hurdles.

Despite the ambiguity surrounding the (non-)existence of disclosure obligations, sometimes a funded party may be willing to disclose the existence of a funding arrangement voluntarily. By disclosing the fact that it has obtained third-party funding, a party can seek to indicate that it has means to pursue the proceedings and, thus, leverage its position in settlement negotiations. Or it may be signaling that its claim has strong merits, as a funder has agreed to finance it.<sup>107</sup> Existence of third-party funding may also be disclosed for reasons that are not linked to the arbitral proceedings, such as to comply with public disclosure requirements of a listed company.<sup>108</sup>

Even though funded parties may sometimes be willing to disclose the existence of a funding arrangement, it seems that, as a general rule, third-party funders are not keen on disclosing their involvement to the opposing party or the arbitral tribunal.<sup>109</sup>

## Disclosure of Third-Party Funding in Investor-State Arbitration

Certain recently negotiated free trade agreements require disclosure of the existence of any third-party funding arrangements in investor-state arbitration. For example, pursuant to the Comprehensive Trade and Economic Agreement between Canada and the European Union (the “CETA”),<sup>110</sup> “[w]here there is third-party funding, the disputing

party benefiting from it shall disclose to the other disputing party and to the Tribunal the name and address of the third party funder”.<sup>111</sup> The CETA does not require disclosure of the content of the funding agreement, but the identity of the funder must be disclosed to the other party and the arbitral tribunal. Under the CETA, third-party funding is defined as “any funding provided by a natural or legal person who is not a party to the dispute but who enters into an agreement with a disputing party in order to finance part or all of the cost of the proceedings either through a donation or grant, or in return for remuneration dependent on the outcome of the dispute”.<sup>112</sup> The definition is arguably broad as it also encompasses donations made by third parties.

The debate surrounding third-party funding in investor-state arbitration – or in commercial arbitration involving a state party – has at its root the growing involvement of litigation funds in these proceedings. Arbitrations against states, in particular investment arbitrations, often deal with large claims. It is, thus, not a surprise that litigation funds – also referred to sometimes as “vulture funds” – have found these disputes and gotten engaged as funders with the aim of obtaining a slice of the award and generating an attractive return on investment. The calls for disclosure of the claimants’ funding arrangements in claims against states have become louder, because of, on the one hand, the negative image that litigation funds sometimes have in the public’s eyes, and on the other hand, the perception of a state’s affairs being its people’s affairs.

## Financial Institution Arbitration

### Financial Institutions’ Traditional Preference for Litigation

Before the 2008 financial crisis, banks and financial institutions sued other banks or commercial customers only under exceptional circumstances.<sup>113</sup> Disputes that arose out of loan agreements, derivative contracts, sale of

106 *Von Goeler* 2016, p. 149.

107 *Von Goeler* 2016, p. 126.

108 *Von Goeler* 2016, p. 127.

109 *Von Goeler* 2016, p. 37.

110 The European Union and Canada have signed the CETA and the European Parliament voted in favor of the CETA on 15 February 2017. However, the agreement comes into force only after the EU national parliaments have approved it. For the text, see [http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc\\_152806.pdf](http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf) (last visited 30 May 2017).

111 The Comprehensive Economic and Trade Agreement, Article 8.26, para 1.

112 The Comprehensive Economic and Trade Agreement, Article 8.1.

113 *Klaus Peter Berger*, The aftermath of the financial crisis: why arbitration makes sense for banks and financial institutions, *Law and Financial Markets Review*, January 2009, p. 54.

# Recent trends in International Arbitration

loan portfolios or similar transactions were mainly settled out of court.<sup>114</sup> The financial crisis of 2008 brought an unprecedented wave of claims by and against financial institutions, as well as among them.<sup>115</sup> The choice of the right dispute resolution mechanism has, therefore, become more important for banks and financial institutions.<sup>116</sup>

Historically, financial institutions have shown a marked lack of faith in arbitration.<sup>117</sup> They have preferred national courts in key financial centers, such as New York, London, Frankfurt and Hong Kong.<sup>118</sup> One explanation for this preference is the traditional perception of the nature of financial disputes:<sup>119</sup> financial disputes have typically involved straight-forward claims with no technical or fact-finding issues, and banks and other financial institutions have often argued that there is no need to submit such “one-shot money disputes” to an arbitral tribunal whose constitution necessarily takes some time.<sup>120</sup> Arbitration has also been perceived as being slower than national court proceedings in some jurisdictions and, thus, not as suitable for resolving financial disputes.<sup>121</sup> The banking sector has also criticized arbitrators for being inclined to render equitable decisions (“splitting the baby”) instead of decisions based strictly on the contractual terms.<sup>122</sup> However, as explained by one arbitration practitioner, this criticism seems to rely on “a fundamental misunderstanding”.<sup>123</sup>

## ICC Commission Report on Financial Institutions and International Arbitration

In 2016, the ICC Commission on Arbitration and ADR published the ICC Commission Report on Financial

Institutions and International Arbitration (the “Report”).<sup>124</sup> The Report was prepared by the Commission’s Task Force on Financial Institutions and International Arbitration. The Report analyzes financial institutions’ perceptions and experience of international arbitration. It covers a wide range of banking and financial activities and many types of financial institutions.<sup>125</sup>

One of the key findings of the study conducted by the Task Force was that “[t]here is an overall lack of awareness of the potential benefits of international commercial arbitration and investment arbitration in banking and financial matters and there are some common misperceptions about the process”.<sup>126</sup> The interviews conducted for the study revealed that most financial institutions do not have significant experience in international arbitration,<sup>127</sup> which is likely to explain another telling finding of the Task Force: the Task Force found that international arbitration is used in various forms and in various lines of business in the banking and finance sectors but not to its full potential.<sup>128</sup> The lack of awareness of the potential benefits combined with the view that arbitration is not suitable for certain segments of the banking sector seem to have been the key drivers for the limited use of international arbitration.<sup>129</sup>

According to the Report, financial institutions usually favour arbitration where: “(i) the transaction is significant or particularly complex; (ii) confidentiality is a concern; (iii) the counterparty is a state-owned entity; or (iv) the counterparty is in a jurisdiction where recognition of foreign court judgments is problematic or where enforcement of an arbitral award under the New York Convention will be easier than enforcement of

114 *Berger* 2009, p. 54; *Susanne Kratsch*: The financial crisis: arbitration as a viable option for European financial institutions, p. 680, 76(4) *Arbitration* 2010, pp. 680 – 685.

115 ICC Commission on Arbitration and ADR, *Financial Institutions and International Arbitration* (the “Report”) 2016, <https://cdn.iccwbo.org/content/uploads/sites/3/2016/11/ICC-Financial-Institutions-and-International-Arbitration-ICC-Arbitration-ADR-Commission-Report.pdf> (last visited 30 May 2017), p. 7.

116 *Berger* 2009, p. 54.

117 *Ibid.*

118 The Report, p. 2; *Berger* 2009, p. 54.

119 *Berger* 2009, p. 54; *Kratsch* 2010, p. 680.

120 *Berger* 2009, p. 55.

121 *Berger* 2009, p. 55; *Kratsch* 2010, p. 680.

122 *Berger* 2009, p. 56; *Kratsch* 2010, p. 680.

123 *Berger* 2009, p. 56.

124 The Report, <https://cdn.iccwbo.org/content/uploads/sites/3/2016/11/ICC-Financial-Institutions-and-International-Arbitration-ICC-Arbitration-ADR-Commission-Report.pdf> (last visited 30 May 2017).

125 ICC, *Financial Institutions and International Arbitration – ICC Arbitration & ADR Commission Report*, <https://iccwbo.org/publication/financial-institutions-international-arbitration-icc-arbitration-adr-commission-report/> (last visited 30 May 2017).

126 The Report, p. 2.

127 “70 percent of interviewees were not aware whether their financial institutions had participated in any international arbitration proceedings in the last five years.”

The Report, p. 8.

128 The Report, p. 6.

129 *Ibid.*

# Recent trends in International Arbitration

a court judgment”.<sup>130</sup> Thus, the perceived key advantages of arbitration are cross-border enforcement, sector-specific expertise, procedural flexibility, confidentiality, finality and political neutrality.<sup>131</sup> Many of these attributes are typically listed as arbitration’s key advantages by all users of arbitrations, so they hardly come as a surprise. In line with the discussion regarding transparency described under **Transparency** above, according to the Report, some financial institutions considered that “the need for precedent trumps the advantages of confidentiality in those areas of banking and finance where it has a role to play”.<sup>132</sup> Interestingly, some financial institutions also expressed an interest in inclusion of an appeal mechanism in arbitration, subject to the consent of all the parties to the dispute.<sup>133</sup>

Financial institutions identified the following as perceived limitations of arbitration: the need to go to court to obtain interim measures before an arbitral tribunal is constituted; the absence of summary awards/ default judgments; risk of parallel, related proceedings; lack of precedent; costs; lack of transparency; and arbitrators’ inability to commence insolvency proceedings.<sup>134</sup> As mentioned in the Report, the first concern (*i.e.*, the need to obtain an interim measure from a court) seemed to be based on lack of knowledge about the procedure for the appointment of an emergency arbitrator.<sup>135</sup> Certain other concerns also seemed to be based on misperceptions or lack of knowledge about the possibilities that most arbitral institutions and rules offer, such as consolidation of arbitration proceedings and publication of redacted awards.<sup>136</sup> But the finance sector is not alone with certain of these concerns, such as the lack of precedent and transparency more generally (both discussed under **Transparency** above). Interestingly, the concern over transparency related mainly to the perception of arbitration as an “exclusive club”:<sup>137</sup> some interviewees mentioned

that they do not feel comfortable when “navigating in this world”.<sup>138</sup>

The findings published in the Report are certainly valuable for the arbitration community and especially for arbitral institutions. They are “[e]xpected to become the linchpin of a constructive dialogue between arbitral institutions and federations of financial institutions, thus heralding a new era in banking and financial dispute resolution.”<sup>139</sup>

## Financial Disputes’ Increasing Role in Arbitration

Despite financial institutions’ relative reticence towards arbitration, according to the Report, “[a]rbitration is increasingly a part of the strategic options considered for cross-border banking and financial disputes”.<sup>140</sup> Indeed, the increased complexity of financial disputes in the wake of the 2008 financial crisis, the increasing involvement of parties from emerging markets, and the changing regulatory environment have led to financial institutions being more and more open to the use of international arbitration.<sup>141</sup>

The number of industry-specific arbitration initiatives also shows banking and finance industries’ increased interest in the use of arbitration – and the dispute resolution industry’s increased interest in financial disputes. For example, International Swaps and Derivatives Association, Inc. (“ISDA”) published a guide on the use of arbitration in the ISDA Master Agreement in September 2013. The international finance disputes center P.R.I.M.E. Finance in The Hague (working jointly with the PCA) and Hong Kong’s Financial Dispute Resolution Centre (FDRC) both offer arbitration, mediation and other dispute resolution services to the finance sector. And the China International Economic and Trade Arbitration Commission (known as CIETAC) has specific arbitration rules for financial disputes.<sup>142</sup>

130 The Report, p. 8.

131 The Report, pp. 9 – 10.

132 The Report, p. 9.

133 *Ibid.*

134 The Report, pp. 10 – 11.

135 The Report, p. 10.

136 *Ibid.*

137 *Ibid.*

138 *Ibid.*

139 *Claudia T. Salomon and Georges Affaki: ICC Report Identifies Financial Institutions’ Experience and Perceptions Of International Arbitration*, Kluwer Arbitration Blog, 22 December 2016, <http://kluwerarbitrationblog.com/2016/12/22/booked-icc-taskforce/> (last visited 30 May 2017).

140 The Report, p. 5.

141 The Report, p. 2; *Sir Peter Cresswell, Stuart Dudson, Conor Redmond: Towards expedited and cost-effective arbitration award in financial services disputes*, p. 306, *Arbitration* 2016, 82(3), pp. 306 – 318.

142 For the rules, see, <http://www.cietac.org/index.php?m=Page&a=index&id=108&l=en> (last visited 30 May 2017).

# Recent trends in International Arbitration

In 2016, banking and finance was one of the LCIA's predominant industry sectors: 20.55 percent of arbitrations commenced under the LCIA Rules related to the banking and finance industry.<sup>143</sup> At the FAI, 14 percent of cases commenced in 2016 related to finance and insurance sectors. And 11 percent of SCC cases commenced in 2016 arose out of credit or loan agreements.<sup>144</sup> Thus, today, financial disputes seem to form an important part of arbitral institutions' cases, and their role is likely to grow.

## Diversity in International Arbitration

### Changing the Paradigm of "Pale, Male, and Stale"

Diversity in international arbitration, particularly among arbitrators but also among partners in the top law firms and professors of the highest ranked law schools, has been gaining increasing importance in the last few years, and the discussion seems to be far from over. This conversation has at its roots the paradigm of the typical arbitrator as being "pale, male, and stale"<sup>145</sup> – that is to say a white man, from North America or Western Europe, towards the latter third of his career.<sup>146</sup>

Various sources confirm the accuracy of this paradigm. Beginning with the ICC, in 2016, female arbitrators represented approximately 15 percent of all ICC appointments.<sup>147</sup> Based on the list of arbitrator appointments

available on the ICC website, during the first four months of 2017, 39 women were appointed as arbitrators to ICC cases, as compared to 192 men.<sup>148</sup> According to Chambers and Partners, two out of 37 of the world's most in-demand arbitrators are women.<sup>149</sup> 25 of those 37 are Western European<sup>150</sup> and eight Northern American (we note that one arbitrator holds both UK and Canadian citizenships and is, thus, included in both).<sup>151</sup> At the time of writing, ages of the most in-demand arbitrators whose year of birth was available online ranged from 62 to 82 years.

Habit seems to be the main explanation to this phenomenon: the pioneers of arbitration were predominantly white men from Europe or the United States, and the users of arbitration are used to, and prefer, seeing these same individuals arbitrate their disputes.<sup>152</sup> A select group of arbitrators are in high demand because they are a well-known entity. While many up-and-coming arbitrators may be just as well suited to handle an international arbitration, parties with much at stake are typically not keen on selecting a relatively unknown arbitrator.<sup>153</sup> As summarized in an international arbitration survey on diversity of arbitral tribunals, "[e]stablished practice in international arbitration is acknowledged to block change and keep new entrants out – the same arbitrators are chosen again and again".<sup>154</sup> In other words, it seems that "[w]e struggle to escape the past".<sup>155</sup>

Over the past couple of decades, the arbitration community has awakened to wonder whether this narrowly delimited

143 The London Court of International Arbitration, *LCIA Facts and Figures – 2016: A Robust Caseload*, 3 April 2017, p. 6, <http://lcia.org/News/lcia-facts-and-figures-2016-a-robust-caseload.aspx> (last visited 30 May 2017).

144 FAI Statistics 2016, <http://arbitration.fi/2017/02/23/review-fais-year-2016/> (last visited 30 May 2017); SCC Statistics 2016, <http://www.sccinstitute.com/statistics/> (last visited 30 May 2017).

145 An often repeated quotation attributed to Sarah François-Poncet. *Michael Goldhaber*: Madame La Presidente – A woman who sits as president of a major arbitral tribunal is a rare creature. Why?, 1 *Transnational Dispute Management*, July 2004.

146 *Elizabeth Oger-Gross*: Gravitas: persuasion and legitimacy, 4 *TDM* 4 2015, p. 1; *Joseph Mamounas*: ICCA 2014. Does "Male, Pale, and Stale" Threaten the Legitimacy of International Arbitration? Perhaps, but There's No Clear Path to Change, *Kluwer Arbitration Blog*, 10 April 2014, <http://kluwerarbitrationblog.com/2014/04/10/icca-2014-does-male-pale-and-stale-threaten-the-legitimacy-of-international-arbitration-perhaps-but-theres-no-clear-path-to-change/> (last visited 30 May 2017).

147 *Lucy Greenwood*: Diversity and Inclusion – It's a numbers game, <http://www.greenwoodarbitration.com/diversity-and-inclusion/> (last visited 30 May 2017).

148 International Chamber of Commerce, ICC Arbitral Tribunals, <https://iccwbo.org/dispute-resolution-services/arbitration/icc-arbitral-tribunals/> (last visited 30 May 2017).

149 Chambers and Partners, Arbitration (International): Most in Demand Arbitrators – Global-Wide, <http://www.chambersandpartners.com/15649/1245/editorial/2/1> (last visited 30 May 2017).

150 The following nationalities were represented (in alphabetical order): Austria, Belgium, France, Germany, Spain, Switzerland (one Swiss arbitrator also held Brazilian citizenship), the Netherlands and the United Kingdom (one UK arbitrator also held Canadian citizenship).

151 US or Canadian citizens (one Canadian arbitrator also held UK citizenship).

152 *Oger-Gross* 2015, p. 3.

153 *Caroline Simson*: 3 International Arbitration Trends To Watch In 2017, 2 January 2017, <https://www.law360.com/articles/875024/3-international-arbitration-trends-to-watch-in-2017> (last visited 30 May 2017).

154 BLP, International Arbitration Survey: Diversity on Arbitral Tribunals. Are We Getting There? [http://www.blplaw.com/media/download/FINAL-Arbitration\\_Survey\\_Report.pdf](http://www.blplaw.com/media/download/FINAL-Arbitration_Survey_Report.pdf) (last visited 30 May 2017), p. 2.

155 *Ibid.*

# Recent trends in International Arbitration

group of people represents the best resourcing for resolving international commercial disputes.<sup>156</sup> Disputes that go to arbitration encompass dozens of different legal systems, cultures, and expectations.<sup>157</sup> Diversity spawns perspective and could make arbitration more just and fair.<sup>158</sup>

Arbitral institutions are, therefore, becoming active in trying to break the boundaries of this club of a relatively select few. For instance, institutions are clearly more likely to appoint women as arbitrators than the parties or co-arbitrators: in 2016, the overall percentage of female arbitral appointments in cases administered by the LCIA was 20.6.<sup>159</sup> Of these appointments, approximately 78 percent were made by the LCIA, approximately 9 percent by the parties, and approximately 13 percent by the parties' nominees.<sup>160</sup> Information from other arbitral institutions tells the same story.<sup>161</sup> In international comparison, both the FAI and the SCC have a high level of gender diversity in their arbitrator appointments. In a study that was conducted for the Equal Representation in Arbitration Pledge discussed below, the FAI had the highest numbers of female arbitrator appointments of all arbitral institutions. In 2016, 32 percent of the arbitrators appointed by the FAI Board were women.<sup>162</sup> However, only 16 percent of the arbitrators appointed by the parties were women.<sup>163</sup> Even though the figure is significantly lower than the one for arbitrators appointed by the FAI Board, this number was improved in comparison with previous years.<sup>164</sup>

Whereas appointments of female arbitrators have been fairly well documented in the past few years, little statistics exist on ethnic and racial representation in arbitral tribunals or on arbitrators' average age. According to one commentator, in 289 closed ICSID cases from January 1972 to May 2015, 45 percent of cases were conducted by arbitral tribunals composed of all Anglo-European arbitrators.<sup>165</sup> Together

with the Chambers and Partners' finding about 32 out of 37 arbitrators being Western European or North American (see above) and the sheer empirical experience of these authors, Caucasians represent the vast majority of arbitrators. Further, as described above, the most in-demand arbitrators have all reached a respectable age. Based on these findings, being nominated as an arbitrator may be a challenging task for women, non-Caucasians or less experienced arbitration practitioners. This is, of course, a problem in itself in light of the universal concerns for equality and diversity. But in addition to some practitioners' (*i.e.*, the young, female or non-Caucasian) personal considerations, and the risk of missing great talent that would sometimes be better suited to resolve certain types of disputes, the lack of diversity can also be seen as a threat to the legitimacy of arbitration.<sup>166</sup> As noted above, international arbitration, especially investment arbitration, is from time to time referred to as a global secret club.<sup>167</sup> Adding to the suspicion that the confidentiality, or "secrecy", of arbitration in and of itself creates, the fact that this "secret club" is mainly constituted of 60-year old plus, Caucasian males is unlikely to increase the public's confidence in arbitration.

However, this trend is likely to change in light of the number of women taking on senior positions in top law schools and top law firms. The same holds true with respect to non-Caucasian arbitrators, as the student and associate pool in those same schools and firms is diversifying. The determining question in diversifying the arbitrator pool seems to be linked to an unavoidable generation shift. The current generation of partners appointing arbitrators is choosing among a pool in which two out of 36 are women and five out of 36 non-Caucasians. The next generation of partners making these choices will have a more diversified pool to select from, and the generation after that even more so.

<sup>156</sup> Louise Barrington and Rashda Rana: *ArbitralWomen/TDM Special Issue on 'Dealing with Diversity in International Arbitration'*, 12 TDM 2 (2015).

<sup>157</sup> *Ibid.*

<sup>158</sup> Mamounas 2014.

<sup>159</sup> *LCIA Facts and Figures*, p. 13.

<sup>160</sup> *Ibid.*

<sup>161</sup> For example, in 2015, the overall percentage of female arbitral appointments at the Swiss Chambers' Arbitration Institution was 28.5 percent. However, when parties or co-arbitrators appointed arbitrators, only 5 percent were female. For a comparison on different institutions, see <https://www.whitecase.com/sites/whitecase/files/files/download/publications/arbitral-institutions-respond-to-parties-needs-2017.pdf> (last visited 30 May 2017).

<sup>162</sup> FAI, *A Review of The FAI's Year 2016*, <http://arbitration.fi/2017/02/23/review-fais-year-2016/> (last visited 30 May 2017).

<sup>163</sup> *Ibid.*

<sup>164</sup> *Ibid.*

<sup>165</sup> BLP International Arbitration Survey, p. 2.

<sup>166</sup> Mamounas 2014.

<sup>167</sup> See, for example, a BuzzFeed series titled "Secrets of a Global Super Court" dedicated at criticizing investor-state dispute settlement, <https://www.buzzfeed.com/globalsupercourt> (last visited 30 May 2017).

# Recent trends in International Arbitration

But for this to happen, today's arbitration practitioners must work to ensure that the paradigm of "pale, male, and stale" changes and does not remain a fixed mindset within the arbitration community, equating those attributes with quality decision-making.

## Equal Representation in Arbitration Pledge

In 2015, members of the arbitration community drew up a pledge to take action on the under-representation of women in international arbitration. The Equal Representation in Arbitration ("ERA") Pledge (the "Pledge") was launched in May 2016. It aims to increase, on an equal opportunity basis, the number of women appointed as arbitrators.<sup>168</sup> The ultimate goal is full parity.<sup>169</sup> The Pledge establishes concrete steps aimed at improving representation of women in arbitration and, in particular, ensuring appointment of women as arbitrators. These steps include, among others, ensuring that committees and conference panels in the field of arbitration include a fair representation of women; lists of potential arbitrators include a fair representation of female candidates; and that experienced arbitration practitioners support, mentor and encourage women to pursue arbitrator appointments and otherwise enhance their profiles and practice.<sup>170</sup>

The Pledge has been described as a turning point for gender diversity in arbitration.<sup>171</sup> On 30 May 2017, the pledge had 1,875 signatories, including well-known law firms and arbitral institutions, such as the ICC, the LCIA, the SCC and the FAI.

ERA also offers assistance with searching for female arbitrator candidates. On its website, ERA provides an arbitrator search form where parties or counsel can fill in information they deem necessary to enable ERA to propose female arbitrator candidates.<sup>172</sup> The information requested in the form includes required field of expertise, applicable law,

language of arbitration, place of arbitration and other relevant information about the dispute.

## Other Instruments Aimed at Increasing Diversity in International Arbitration

Arbitral institutions have had a valuable role in promoting greater diversity in arbitral tribunals. Certain institutions have adopted specific policies and other instruments to that effect. In May 2016, the ICC published a Note to National Committees and Groups of the ICC on the Proposal of Arbitrators.<sup>173</sup> In the note, the ICC states that "Nominations Commissions membership should observe generational and gender diversity" and that "[d]iversity as to the various components of the local arbitration community should also be observed".<sup>174</sup> The ICC also encourages National Committees and Groups of the ICC to favour gender diversity in their proposals of arbitrators.<sup>175</sup> In addition, many institutions publish annual statistics on appointment of female arbitrators and, thus, enhance transparency in this regard. Ensuring that "gender statistics for appointments (split by party and other appointment) are collated and made publicly available" is also a part of the Pledge that most arbitral institutions have signed.

Various conferences and seminars organized in recent years by institutions and arbitral associations have addressed diversity. For example, diversity was one of the topics discussed at the ICC United Kingdom's Annual Arbitration Conference,<sup>176</sup> and the FAI co-organized with the Swedish Women in Arbitration Network an event on the topic "Should We Still be Talking About Diversity in International Arbitration?" in connection with the 2016 Helsinki International Arbitration Day.<sup>177</sup>

168 ERA, Commentary to the Pledge, <http://www.arbitrationpledge.com/about> (last visited 30 May 2017).

169 Ibid.

170 For the full Pledge, see <http://www.arbitrationpledge.com/pledge> (last visited 30 May 2017).

171 *Mirèze Philippe*: Equal Representation in Arbitration (ERA) Pledge: A Turning Point in the Arbitration History for Gender Equality, Kluwer Arbitration Blog, 2 June 2016, <http://kluwearbitrationblog.com/2016/06/02/equal-representation-in-arbitration-era-pledge-a-turning-point-in-the-arbitration-history-for-gender-equality/> (last visited 30 May 2017).

172 Equal Representation in Arbitration, Search for Female Arbitrators, <http://www.arbitrationpledge.com/search> (last visited 30 May 2015). ERA clearly highlights that the assistance provided is made to facilitate the search for potential female arbitrators without any commitment or liability whatsoever for ERA. ERA makes the proposals only to provide ideas of potential profiles. They further clarify that the suggested female arbitrators will not be contacted and that they will not be aware that their names were proposed.

173 ICC, Note to National Committees and Groups of the ICC on the Proposal of Arbitrators, 2016 ("ICC Note to National Committees 2016"), <https://cdn.iccwbo.org/content/uploads/sites/3/2016/06/Note-to-National-Committees-and-Groups-of-the-ICC-on-the-Proposal-of-Arbitrators-ENGLISH.pdf> (last visited 30 May 2017).

174 ICC Note to National Committees 2016, p. 2.

175 ICC Note to National Committees 2016, p. 4.

176 ICC, ICC United Kingdom – Annual Arbitration Conference, <https://iccwbo.org/event/icc-united-kingdom-annual-arbitration-conference/> (last visited 30 May 2017).

177 FAI, Champagne Brunch for Ladies in Arbitration, <http://arbitration.fi/fi/2016/04/05/champagne-brunch-ladies-arbitration-27-may-2016/> (last visited 30 May 2017).



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# Recent trends in International Arbitration

Some associations have gone even further by organizing specific campaigns addressing gender diversity in international arbitration. For example, to celebrate International Women's Day 2017, the Russian Arbitration Association (the "RAA") published a YouTube video on diversity in international arbitration.<sup>178</sup> In the video, the RAA interviewed several well-known Russian and international arbitrators on the reasons behind the under-representation of women on arbitral tribunals.

As discussed under **Transparency in International Commercial Arbitration** above, Arbitrator Intelligence aims at increasing transparency in arbitrator appointments, but the steps taken by Arbitrator Intelligence to increase transparency

can also promote diversity with respect to both gender and ethnic diversity.

In summary, in recent years the arbitration community has actively sought ways to promote diversity in international arbitration. It remains to be seen how these steps affect the statistics in the long run. However, even though the arbitration community itself is very active, a big challenge that still remains is how to get the users of arbitration to promote diversity. Moreover, to date the discussion on diversity has focused mainly on gender diversity, while diversity includes "cultural, racial, geographic, language and gender differences".<sup>179</sup>

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178 <https://www.youtube.com/watch?v=LucvYH8Bjlk> (last visited 30 May 2017).

179 *Sasha A. Carbone and Jeffrey T. Zaino: Increasing Diversity Among Arbitrators: A Guideline to What the New Arbitrators and ADR Community Should Be Doing to Achieve This Goal*, NYSBA Journal 2012, p. 33.