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Panel II: Recent Rule Changes and Legal Developments

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PANEL II: RECENT RULE CHANGES AND LEGAL DEVELOPMENTS

PANEL 2: RECENT RULE CHANGES AND LEGAL DEVELOPMENTS

M = Moderator

P = Panelist

A = Attendee

M: Welcome back, everyone. Our second panel, Recent Rule Changes and Legal Developments, will be moderated by **M2**, a professor of law at [Redacted] and an associate reporter of the Restatement of the Law of the US Law of International Commercial [and Investor-State] Arbitration. I will hand it over to **M2** to do the introductions for the rest of the panelists.

M2: Thank you, **M**, and thanks for your hospitality, the Law Review's hospitality. Thank you, all, for being here in this lovely DC winter weather, which at least is rain rather than ice. Our panel is on, I will confess, current events. So, a little bit of everything, but I do think there are some themes that I will talk about in just a second. First, I do want to introduce the rest of the panelists, and we will go down from my right, immediate right, further to the right, and we are going to be very brief. So, following **M1**'s lead. **P4** is a partner at [Redacted]. Then, next to him, is **P3**, who is an associate at [Redacted] and an American University alum. The only college mention there will be. **P2**, partner at [Redacted], next to her, and then **P1**, an associate at [Redacted] next to him. Frankly, the most important qualification that all of them have is they are all actively involved in international arbitration practice and international dispute resolution more generally.

The panel, as I said, could be seen as a catch-all of current legal developments, but I think the underpinnings are a cross-current of political and market events. I mean, hopefully — you may . . . have a sense [that] there is a lot of competition among jurisdictions and institutions to attract arbitration business, so some of the topics that will be talked about today are changes in institutional rules. In part, that is in response to competitive pressures. Similarly, jurisdictions, like countries, revise, to the extent that they can, national laws to try to attract arbitration business. The United States has not been really successful at that since the key governing statute,

the Federal Arbitration Act,¹ is approaching its 100th anniversary. A few changes, but not many. But the Restatement is a way to try to help the US law along in ways that Congress hasn't been able to do. But the countercurrent is, arbitration is not always popular, and so there are countervailing political pressures to reduce, regulate, the arbitration process. I think we may see some of that — we are seeing some of that — in the United States right now. That seems to be a way that the individual presentations you'll be hearing in just a second, connect. So, we are going to start with **P4** who's going to talk about the Restatement project.

P4: Thanks, **M2**. I will point [out] immediately that **M2** is one of the reporters on the Restatement project and therefore knows a great deal more about it than I do. He's reserving his fire to disagree with me after I stick my neck out. Back when I was in law school, which coincided roughly with the end of the last ice age, you walked into the library, and immediately by the door was a bookshelf with a handsome set of books called "The Restatement of the Law" of this and "The Restatement of the Law" of that. Everybody knew they were there. Whatever subject you were studying, there was a Restatement, and it was a terrific resource, and the books were never on the shelves because somebody was always using them somewhere. Now, nobody has books, and I am not sure how accessible the Restatement is online. So, consider this, to some extent, a commercial for the Restatement because it does not exist yet. It is about to come into existence, and it is going to be a huge asset to everyone who practices international arbitration.

So, for starters, since the books do not exist and the libraries are gone, what is a Restatement? I hope some of you know, maybe even most of you know, that Restatements of the Law are produced by a group called The American Law Institute, which is a very venerable [institution]. It is probably 100 years old, isn't it, **M2**? A group of mostly law professors, judges, and practicing lawyers in varying proportions. The law professors tend to dominate the discussions, [and] take it upon themselves, on a particular topic, to put together — a "restatement" is a carefully chosen word — of what the courts have said on that subject. It is basically a practical way of coping with common law. I've found often that European lawyers trying to get a grip on American law cling to it because it is the closest thing to a code that we have. Up to now, there has been no such resource for arbitration law, even though arbitration law in this country is largely a creature of common law. The Arbitration Act, in many ways, resembles the Sherman Act² in that it pronounces broad principles, but it does not provide much

1. 9 U.S.C. § 1–2 (2018).

2. 15 U.S.C. § 1 (2018).

detail. Over the ninety-three years that the act has been in effect, it has accumulated a very thick crust [of] judicial opinions, but it takes a while to sort through them and find the ones that matter to whatever issue you're dealing with. The Restatement is finally about to impose some discipline and order on that subject.

The Restatements are drafted principally by a very small group — in this case, five — called Reporters, who are all law professors, chaired by George Bermann of Columbia University. Then it is massaged, critiqued, whatever, by a larger group of about twenty-five Advisors, [of] which I have the privilege to be one. Then it is subjected to further critique by a larger, about a 200-lawyer group called the Members Advisory Group. Then, eventually, provision-by-provision, it is voted on at the annual meeting of the ALI, which often has 1,000 [or more] people in attendance.

The structure of the Restatement is to state principles of law distilled from the cases very succinctly in what's called black letter, which is literally — in the old days, at least, when there were books — it was large black type, which tried to capture in a sentence a principle that summed up [the] law on a subject. Followed by a couple of pages of what are called comments, which explain the black letter. Followed by often many pages of what are called reporter's notes in smaller print, which give you the case citations and explain the pros and cons, which way the courts have gone, and why the black letter statement is a reasonable summary, if you will, of what the courts have said. Every once in a while, the reporters get a little adventurous, and the black letter departs a bit from what the courts have said.

This project was launched in 2007, so, it is twelve years old. It is scheduled to be subjected to a final vote [of] the ALI membership at the annual meeting in May, so it is just about to be launched, and I hope shortly thereafter will appear in a handsome bound [set] of books that probably only three or four of us will actually ever possess. But somewhere, it will be online. So, to illustrate the process a little bit and also to see if I can provoke M2 into — I've never seen M2 lose his temper, actually — but at least into responding; [let me] just pick one small point, which happens to be the one small point [on] which I disagree with the learned reporters.

I won't try to describe the structure of the Restatement except to emphasize that it deals [mostly] with international commercial arbitration. So, the starting point I hope all of you appreciate, and I think you're all either lawyers or law students, is that that means that it comes into American law [through] the gateway of Chapter Two of the Federal Arbitration Act, not Chapter One.³ Although, those of you who have dealt with [that] Chapter

3. See generally Federal Arbitration Act, 9 U.S.C. §§ 201–208 (2018). The gateway will be Chapter Three, if the applicable treaty is the Panama Convention. See 9 U.S.C.

Two understand Chapter One comes back in the backwash with almost every question,⁴ but the basic structure is international. How do the courts deal with, basically, the application of the New York and Panama conventions and the very rare . . . international case, that isn't governed by either? How do they distinguish between cases governed by the convention that are seated in the United States, as opposed to cases seated outside the United States? How do they deal with the enforcement of agreements to arbitrate [and] with enforcement of awards, with setting aside of awards, and all of the reasons courts get involved?

Because the Restatement sees itself as a manual for judges, it does not tell you how to conduct an arbitration. It does not tell the arbitrators how they should behave. It is a resource for judges confronted with an issue of law involving an arbitration. So, one of the subjects tackled is, when a court has to rule on a question of arbitrability, and this is especially important at the beginning of a case when a court is enforcing an arbitration agreement or declining to. [If] the contract that contains the arbitration clause incorporates the institutional rules of an arbitration [institution], such as the American Arbitration Association, which contains a provision that says, "Arbitrators may rule on their own jurisdiction," [d]oes the court consider that [provision] a delegation of the power to pronounce on questions of arbitrability to the arbitrators or does it not?

Questions of arbitrability come in many flavors. The Supreme Court has sliced and diced them into procedural and substantive, and issues that Professor Bermann calls "gateway issues." Others that he calls "twilight issues." There are any number of them, but the core question is when a court gets one of these, does the court say, "That's for the arbitrators"? The court almost always would. For example, if the question is, "Has the condition precedent been complied with?" Or does [the judge] say, "That's for a court"? The court almost always will, when the question is, "Is the party before me one of the signatories to the contract?"

The question that resulted in a lot of controversy in the Restatement [is what to do] when the arbitration clause incorporates by reference . . . arbitration rules that give arbitrators the power to pass on their jurisdiction, "Does that constitute what the Supreme Court in the first options case called clear and unmistakable evidence of an intention to delegate [to] the arbitrators the power to decide the arbitrability question at the front end?"⁵ When the question is, "Do you compel arbitration . . . ? Or does it not? This

§ 301 et seq. (2018).

4. See 9 U.S.C. § 208 (2018).

5. See *Howsam v. Dean Witter Reynolds Inc.*, 537 U.S. 79, 83 (2002); *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995).

is one where almost every circuit in the United States, the Second Circuit, the DC Circuit, the First Circuit, the Ninth Circuit, has said, “You have such clauses in the ICC rules and the UNCITRAL rules, the LCIA rules, as well as the AAA rules, that the presence of such a clause constitutes clear and unmistakable evidence of intention to delegate.”⁶ The Tenth Circuit and the reporters of the Restatements say, “No, it doesn’t.”⁷ The Reporters, at least, start to explain the reason; they say that [such a clause] amounts to what the French call *positive competence* — that the arbitrators have the power to decide — but it does not include what the French call *negative competence*, which excludes the courts. So, the critique is because it does not specifically exclude the court from intervening, it does not delegate as clearly and unmistakably the power to pronounce to the arbitrators.

Now, the argument I have been trying to make for a long time, and I haven’t got time to go into detail, but it is basic federal law that parties may not by agreement confer on a district court or take away from a district court its jurisdiction. To me, therefore, to say, “The parties must have specifically agreed to exclude court jurisdiction,” means the parties must have specifically agreed to do something which they may not do. Also, as a practitioner, and I’ve been practicing [in] this [area of] law for a very long time, I can tell you that the rule of the Second Circuit, which says, “This goes to the arbitrator, reviewable after the award by a court, but, in the first instance, goes to the arbitrator,” it means your case moves along smoothly and quickly without a two-year detour into the courts to get a ruling. This is a point very difficult to get through to professors. So, I . . . have to tell you the Restatement lays out the law [on] this meticulously, it cites all of the cases, it explains the reasoning pro and con. It is a fantastic resource — just do not assume it is always right.

M2: Thank you, **P4**. I am not so provoked that I am going to jump in right now and respond because, frankly, **P4**’s description of the Restatement position was better than I probably could have done. So, we can talk more about [this] in question-answer if people want to. In the meantime, we will move on to **P2** who will be talking about some of the political cross-currents, I think, and his topic is the new NAFTA, also known as USMCA in its very catchy parlance. So, anything but NAFTA, I guess, is maybe the name for it.

P2: **P4**, . . . I think [the Cold War] was the most pivotal moment in

6. *E.g.*, *Contec Corp. v. Remote Solution Co., Ltd.*, 398 F.3d 205, 209-10 (2d Cir. 2005).

7. See Reporters’ Notes to Sections 2.8 and 2.9 of the Restatement of the Law – The U.S. Law of International Commercial and Investor-State Arbitration (proposed final draft, April 24, 2019).

post-World War II history, at least until now. We will see what happens next. One of the reasons that it was critical was because of a broad . . . policy consensus, known as the Washington Consensus. Basically, because . . . policies of multilateral institutions here as well as policies of the U.S. government in the aftermath of the Cold War, regarding the best way to try to develop economies. If you looked at Eastern Europe after the end of the Cold War, you saw a massive transformation both politically and economically You saw the same in Latin America In that context, NAFTA is . . . a watershed moment. And one of the things that is particularly interesting about NAFTA, if you look at the signing of NAFTA . . . , you see not only Bill Clinton, but you see former Democratic and Republican presidents, you see Democratic and Republican leaders of the House. Democratic and Republican leaders of the Senate all joining together in this moment of Washington Consensus. A far cry from where we stand today in the city of Washington.

. . . [T]he core theme of this conference is whether arbitration is friend or foe of corporations. I think that you've got to understand NAFTA from a few angles

If you look at the preamble of NAFTA, and indeed most investment protection treaties, it is clear that the aim is not to help corporations or states, but rather to promote development. For example, I once was in a hearing, and an opposing party, which was a corporation, said, "This treaty exists to protect investors." That is one component of what an investment protection treaty or NAFTA does. Another component, of course, broadly construed, is to nurture development, in the broadest sense over a long period of time. That was [part of] the Washington Consensus that through openness of investment, free trade, creating new vehicles for promoting the rule of law, we would help states, corporations, citizens, and all stakeholders.

One of the things that is a critical element, of course, of NAFTA is access to international arbitration. . . . [W]hat happen[ed] if there was a dispute between an investor and a state prior to these treaties? In most instances, there was no clear framework for resolving those disputes. So, you can look back through the 20th century, and you can find examples littered through history of the problem of not having a clear framework for resolving cross-border disputes other than the most obvious default — go to the local court — which was not a sufficient risk management tool to facilitate investment.

So, think of it in the simplest terms. If you go to the World Cup, you need some basic rules, you need to know where the arbitrators are going to be to resolve your problems. So, the emergence of investment arbitration was specifically designed to create a way to resolve problems derived from cross-border investment, thereby incentivize cross-border investment because you would know how you could try to resolve your dispute. I would add one

more angle to that — to de-politicize those disputes, which can often be highly contentious, high profile. A lot of the matters that I have worked on over the past twenty-five years show up on the front page of international newspapers. It just happened a couple of days ago. So, putting a more neutral forum to resolve these disputes. Now, that is not only of benefit to investors, it is a benefit to states because it is a burden on states to have diplomatic pressure, political pressure, coming from the United States, the United Kingdom, or whatever government they may be dealing with in trying to resolve a dispute related to foreign investment.

One of the interesting things about the era of the Washington Consensus was after NAFTA, the dream was much bigger. The vision was that NAFTA was a step toward what would become the FTAA — the Free Trade Agreement of the Americas. So, we start off with NAFTA: we've got Canada, United States, Mexico, and then we will move on throughout the rest of the region. Now, that never happened. Instead, what happened over a period of time was a series of bilateral agreements and CAFTA, the Central American version of NAFTA. Then you had treaties with Chile, treaty with Peru, with Columbia. So, it was done on a bilateral basis but not a regional integration basis until the Trans-Pacific Partnership.

The . . . Trans-Pacific Partnership . . . was theoretically on the verge signature and ratification . . . prior to the presidential election. The big focus is usually on, "What does it mean for China?" Which was not, and is not, part of the TPP. But the fascinating thing about the TPP is that it effectively constituted a new NAFTA and a free-trade agreement of the Americas. For the first time you saw likeminded countries, Canada, United States, Mexico, Peru, Chile, aligning on a free trade agreement that spans the western hemisphere. The vision was that once TPP would be in place, others would follow. Most certainly Columbia would have come, Panama would have come, maybe even the post-Kirchner era of Argentina would have come. That is particularly noteworthy because it reflected twenty-five years, almost, after NAFTA . . . a victory for the Washington Consensus, as well as the reasonable modernization of components of NAFTA.

. . . . What has played out over the last couple of years has been basically a path to see what happens after the TPP, which basically died a difficult political death really crossing party lines. It is noteworthy that it has been a risk . . . that there could be a hard exit from NAFTA. Hard exit just like a hard [Br]exit from the EU for England, really. What are the other states that have had hard exits or terminations, enunciations, of these kinds of investment protection treaties? They have been Venezuela of Hugo Chavez, Ecuador of Rafael Correa, and Bolivia of Evo Morales. You can see these explosions, which were basically movements away from these treaties and this consensus. . . .

. . . . In many ways, there are components of the new NAFTA that are TPP elements repackaged and sold differently. But what is particularly noteworthy is that, for the first time, the United States has taken a significant step away from its position of the past twenty-five years with respect to investment arbitration. Now, there have long been debates about the efficacy of investment arbitration. We can address those in question time, if you like, but on a bipartisan basis, administration after administration has favored investment arbitration. Now, for the first time, through Chapter 14 of the USMCA,⁸ we see the United States taking a step away from investment arbitration, . . . restricting the scope of investment arbitration. What has yet to be seen is does this mark the end of the Washington Consensus? A permanent move by the United States away from that Consensus? Or is it simply a hiccup in that road? That is what the fight will play out right here in Washington in the next year, as we see what direction we are going to head. It is . . . tied up with a lot of broader questions about globalization and where things head next for corporations, for states, for the United States, and for . . . people. Thank you.

M2: So, moving from the broad question of whether in fact there will be investment arbitration. **P1**'s presentation will address those features of investment arbitration and . . . changes by [those] administering [investment] arbitrations. One quick note on the Restatement: it actually does have a chapter on investor-state arbitrations, but because we only focus on the role of courts relative to the arbitration process, [the relevance here is] very low. So, it is there, and there are parts of it that I think have important contributions, but it is not as important as ICSID. With that interlude, my apologies.

P1: Thank you. So, I am going to pick up where **P2** left off. Like he mentions, my discussion [is] quite related with his because I am going to be discussing the amendments to the ICSID rules. The ICSID administers seventy percent of investor-state arbitrations, so it is a very significant development that ICSID is amending its rules, that it is doing so in a very long process. The current set of rules is from 2006,⁹ so this is the first time in thirteen years that ICSID is doing this, but it is really the most significant revision that ICSID has done for fifty years. Just to put this into context, ICSID, as you know, is down the street, it is at the World Bank. They

8. United States — Mexico — Canada Free Trade Agreement, USTR (Nov. 30, 2018), <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement>.

9. See International Centre for Settlement of Investment Disputes, *ICSID Convention, Regulations and Rules*, 99–128, https://icsid.worldbank.org/en/Documents/resources/2006%20CRR_English-final.pdf.

administer cases, investor-state arbitrations, and they derive their power [from] the ICSID convention, which has 154 member states. Now, you might ask the question, “Why is it that they are amending the rules and not the ICSID convention itself if the[re] are big foundational issues that they need to deal with?” The answer to that is because it would be extremely difficult to amend the ICSID convention because we would have to get all 154 of the countries to agree, and then they would have to go through the ratification process of ratifying the [revised] treaty. Whereas, with NAFTA, for example, which **P2** just discussed, we have three countries. That in and of itself has been very difficult and contentious. He mentioned the ratification process is certainly not certain at this point.

So, broadly speaking, why is it that ICSID has decided to amend its rules? ICSID has done it because it wants to modernize the rules. It wants to put things in more plain language. It wants to eliminate inconsistencies between the different language versions of the rules in French, English, and Spanish. In a more mundane sense, it wants to reorganize the numbers because they’re not necessarily logical in the way that they’re numbered. ICSID has also revised more than just the arbitration rules. That’s what I am going to talk about. But they’ve also revised their administrative regulations. They’ve revised a separate set of rules, which we refer to as the “additional facility rules,” which appl[y] to either the state involved or the national involved, if not from a member state.

The process to date started in 2016. ICSID has gotten comments, both from the states, which have to end up agreeing with it, two-thirds of what they call the Administrative Council, it has to agree with the amendment at the end of the day. If you look online, and this is something that is really pretty interesting, you can find on ICSID’s website comments that have been posted from all types of stakeholders in investor-state arbitration. This goes beyond states: it includes practitioners, law firms; it includes thinktanks; it includes professors. For example, Professor Franck, here at American University, has submitted a very thoughtful letter that is posted right up there on the ICSID website. It includes arbitrators including, for example, Charles Brower, who I worked with for several years. It includes bar associations. It includes a wide, wide group of people who have taken the time to think about this and write out detailed comments. The process moving forward is that we have a draft set of the new rules as of August of last year, and most likely a vote will take place either this year or next year. So, it is a fairly long process.

So, without getting into the weeds too much, basically the types of amendments that ICSID has made to the rules include things like the following. The evidentiary aspect of the rules [is] largely unchanged, largely also something that is not too controversial. There is more transparency in

the new rules. Where do we see this? For example, in the publication of awards. The default position now is that awards from ICSID will be published unless a party to the dispute objects within sixty days. Even if that takes place, ICSID is going to publish a sanitized version of the award. We also have a new provision on security for costs. Now, for those who aren't familiar with the concept of security for costs, it essentially means the paradigm example is a claimant brings a case against a respondent state, the respondent state thinks that the case is not strong. Not only that, but that the claimant does not have a lot of financial resources. So, when the claimant loses, the respondent's state is hoping to get a cost award, and it does not know that there is going to be any money there from the claimant to pay the cost award. So, it requests that the tribunal force the claimant to pay a certain amount up front, that way the money, the funds, are there after the fact in the eventuality of a cost award. Previously, this was not something that was reflected in the ICSID rules. In fact, ICSID tribunals have disagreed over whether or not they had the authority to order security for cost. They disagreed, also, on what the criteria were to do such an analysis. Now, we have a new stand-alone rule that eliminates doubts on that — it allows a tribunal to order [security for cost and] also includes criteria for that. Whether or not this is going to make a difference, we have yet to see. Just for a statistical, quick snapshot: I think there has been twenty cases where parties have filed an application for security for cost and one successful one. So, that may change, that may not change.

What else do we have? A lot of changes on the way that arbitrators are on the constitution of the tribunal, not so much the appointment process but the disclosure process. When an arbitrator is appointed, he or she typically must disclose up front whether there are certain professional affiliations that he or she has that might raise conflicts. ICSID has now proposed an enhanced disclosure form — arbitrators have to disclose more than they used to, including any links to third-party funders, which I am going to discuss in just a moment. That has been the area that has received the most attention related to the ICSID rules. Arbitrators also have to disclose — you may have heard the term “double hatting,” which means that an arbitrator also serves as counsel, as an expert, or a mediator. Then he or she will have to say the prior cases in which he or she has done in the past so that the parties are aware of any potential conflicts. One thing that I would note about that that is kind of interesting is the new ICSID disclosure form for arbitrators only requires the arbitrator to disclose prior cases where they've served in those capacities for investor-state arbitrations, not for commercial arbitrations. That raises a lot of questions. We will see how that plays out, but there are plenty of conflicts that could also arise from commercial arbitrations. There are also commercial arbitrations that are really investor-state arbitrations that look

like commercial arbitrations. You have a state-owned entity, for example, on the other side or [a] state on the other side.

Challenges — there has also been a lot of changes to challenges. One thing that makes ICSID quite unique is the process reflected in the ICSID convention for a challenge when a party wants to remove an arbitrator. They file the challenge, and the people who decide that challenge in the first instance are the other two arbitrators. ICSID is really unique in that sense, it is reflected in the conventions. They really cannot get around that without amending the convention, which is very difficult, as I discussed earlier. So, what have they done? The convention language says, “If the two other arbitrators are equally divided, they can kick it back to ICSID and let ICSID decide.” We’ve seen in recent years that play out fairly often. Why? We do not know if the arbitrators are necessarily equally divided, but they might not necessarily want to stand in judgment of their colleague, so they prefer to say they’re equally divided. Then, it pushes it back to ICSID to decide. Well, the new rules deal with this issue by saying that the two arbitrators who are sitting in judgment of their colleague can send a challenge back to ICSID if they are unable to decide the challenge for any reason. That gives them an out in order to do that, and it brings ICSID in line with other arbitral institutions.

Lots of other things to discuss. I am going to just get on third-party funding quickly. So, for those who aren’t aware, third-party funding means that a party is receiving funding from a third party so that it can prosecute its case. This usually happens for claimants in investor-state arbitrations. It is something that has received a lot of — it is really come onto the scene [in] the last, let’s say, ten years. It tends to be controversial. ICSID has a new rule that says that if a party is receiving third-party funding, it must disclose that. So, the issue is really the existence of the funding must be disclosed and the name of the funder must be disclosed. Why has the rule received so much attention? In large part because the definition of third-party funding is extremely broad, it includes the provision of funds or other material support not only to a party, but also to an affiliate of a party or to a law firm of a party. So, just to give you an example [of] something that might fall under that category: provision of funds or other material support. Other material support, in that instance, could encompass, for example, a witness. Would a party have to disclose that at the onset of the case? This provision of third-party funding is also linked to the arbitrator declaration I discussed recently, so arbitrators have to disclose if they have connections to anything that falls under that definition of a third-party funder. Why do not I wrap it up there, and we can discuss more.

M2: Very good. Thank you, **P1**. Our final presenter is **P3**, who is going to bring us back to commercial arbitration and talk about changes to the rules

of the ICC, International Chamber of Commerce.

P3: Thank you. Good morning, everyone. Thank you for coming. It is great to see a full room. So, I wanted to round out this panel that has spanned from legal developments, to investor-states, to general frameworks for investment like **P2** discussed, by talking a little bit about some recent rule changes at the International Chamber of Commerce. Just to begin with a little bit more of a broader context, this is specifically commercial arbitration, business-to-business arbitration. If we think about arbitration, friend or foe of corporations — well, I would argue it is a friend of corporations. Why? Because corporations, like business, like the autonomy to decide the rules of procedure. Arbitration gives you and your counterparty the option to develop the rules pursuant to which you will resolve a legal dispute.

Why else would you prefer arbitration over litigation? Well, there is a presumption of more fair or equal treatment and playing field as opposed to being subjected to the local courts of a different country or different jurisdiction. The focus now is increased cost efficiency and increased time efficiency. So, these are all reasons why business-to-business disputes would be, perhaps in many cases, best resolved through commercial arbitration as opposed to domestic litigation.

I am focusing on the International Chamber of Commerce because it really is the preeminent arbitral institution to resolve commercial disputes in the world. The ICC is based in Paris. Actually, the director of the Commercial Arbitration [Center] here at the law school is a former secretary of the ICC. It is just an incredible resource for all students. Since the ICC last revised its rules in 2012, there is been a strong push to develop more regional arbitration centers around the world. So, a lot of development in Asia, for instance: we have the Hong Kong International Arbitration Center, the Singapore International Arbitration Center, and various centers in Europe. All of these centers are competing for business, they want to administer — they want to be the institution administering the dispute. Again, going back to cost and time efficiency, the ICC has tried to pick that up in its most recent rule amendments of 2017. So, on March 1, 2017, new rules took effect. These rules [amendments] are by and large nothing major, with one exception.

The biggest development is the addition of expedited procedure provisions that would apply [to] or be available for users of ICC arbitration. So, the expedited procedure provisions constitute a separate annex to the rules, and they have several interesting characteristics. So, first of all, when do they apply? They apply as a default to any arbitration agreement, any arbitration clause that was signed after March 1, 2017, the amount in dispute does not exceed \$2 million, and the parties haven't opted out. So, if those

requirements are satisfied, the expedited procedure would apply. What does that mean? That means that the arbitration would be resolved by one sole arbitrator as opposed to a tribunal of three.

There are other procedural differences as opposed to a standard ICC arbitration. For instance, the expedited procedure dispenses with the Terms of Reference. So, in ICC arbitration the Terms of Reference are a mutually agreed upon document that basically contains all relevant aspects of the case: who are the parties, who is counsel, what are the legal issues to be resolved in the dispute, what is the language, what are our procedural rules on witnesses and document production, other things like that. Because the terms of reference are agreed upon by both parties and the tribunal, it can take quite some time to negotiate and agree upon. So, the expedited procedure dispenses with the terms of reference. In addition, the case management conference that the arbitrator would hold, must take place within fifteen days of the arbitrator receiving the case. Then, the final award must be issued within six months of receiving the case of that case management conference. So, six months to resolve a commercial dispute is fast, but that is the intent here.

The arbitrator also has quite a bit of discretion to limit the scope of submissions, to limit witnesses. For instance, they can decide to not have witnesses participate in the arbitration so as to resolve the dispute more expeditiously. In general, the arbitrator has quite a bit of discretion to manage the case in an expeditious manner. So, this is something important for users to be aware of because, again, it applies as a default. It can be opted out of if the arbitration clause specifically states that the expedited procedure shall not apply. I think the panel earlier this morning talked about drafting arbitration clauses, and this is an illustration of how important it is to draft a clause that is clear and draft a clause that is well informed by the institutional rules that are going to apply to resolve that dispute.

I think, I am probably going to stop there. There are some other issues that we can discuss in questions and answers, such as whether this affects party autonomy, whether this is a good thing or a bad thing. But in short, the expedited procedure that ICC is now offering is pretty forward-thinking in the sense that while other regional institutions do have expedited procedures available, the ICC is different to the extent that it applies as a default to all claims that do not exceed \$2 million in dispute — that is a very high threshold. You'll have other institutions that have a lower threshold, such as \$250,000 for really small claims, but this really is forward-thinking in that respect. Thank you.

M2: Thank you, **P3.** So, the panel has done a great job of sticking to time limit, which was intentional on our part, anyway, to give you all a chance to raise issues you're interested in. As you can tell from the presentations, there

is a broad range of topics that have been raised, but a very wide range of expertise among the panelists. So, at this point, basically, we will open the floor for questions. Yes.

A1: Hi, my name is **A1**. I am a member of the *Business Law Review*. The questions that I have pertain [to] what **P1** was saying about the amendments [to ICSID]. The first one that I have is: you had mentioned that ICSID will now be publishing [awards, and the advantage of] international arbitration was that these would be confidential. But taking away this confidentiality, do you foresee parties being driven away from international arbitration and going back to [the courts]?

P1: Great question. Thank you, **A1**. Can you hear me? Thanks, **P4**. It is a great question. So, the answer is, we have to keep in mind the difference between investor-state arbitration and commercial arbitration. [C]onfidentiality has always been described as one of the main things that attracts parties who want to arbitrate, especially businesses that do not want all of their secrets getting out there. I mean, if you think about it, do you all know what PACER is? For anyone who does litigation, you can go on PACER, and you can find on a federal court docket virtually every exhibit that is filed in a case, including all business information — anything at all. When you're in arbitration, you do not have to do that, you can have everything remain confidential. The award will eventually come out. Now, the award itself, when it gets enforced, will oftentimes have to go to court, which means that it'll be filed in court, which means that it will become public anyway, but the key is that for most information you can try and keep it confidential.

Let me get to your question, though, directly, which relates to ICSID. ICSID only administers cases that relate to states, so it is investor-state arbitration, and we have a fundamental difference between a dispute between two business entities, or an investor and a state, because the public interest is just more involved in an investor-state arbitration. You have taxpayer money at stake. Investor-state arbitration has simply gotten a lot more mainstream press in recent years because of that. There is a demand from the public to want to know things about disputes relating to investor-state arbitration. For that reason, you've seen a real push towards transparency. I can tell you, for example, ICSID has also done things when they have a hearing, which is what we call a trial, they will open it up to the public or they will live-stream it, maybe slightly time delayed, so that anything that is very sensitive could be removed. People can actually watch it on their laptops, which you usually do not see in a case of just commercial interests.

P4: Can I jump in on that a second?

M2: Go ahead.

P4: Understand, most ICSID awards are already published. What they

have done is flipped from an opt-in to an opt-out. So, at the moment, states have to consent, which they sometimes do and sometimes do not do, under the new rules as I understand it, they'll have to opt-out specifically. The hope is fewer of them will do that.

P1: I would just add one additional comment. The data for transparency is central to arguments about the validity of investment arbitrations. I think that if you look at the available cases, you will see that the vast majority of investor-state decisions are publicly available. Most of them are published with consent, or just one party releases them. So, you have available a very broad range of cases that are critical resources and precedents for understanding foreign investment and law related to foreign investment. You can look at specific issues and decisions in some of the key cases. For instance, we have *Abaclat v. Argentina*,¹⁰ and there was a critical decision in January of 2010 that balanced transparency versus privacy and due process. Because there were certain privacy issues, individuals who were involved and their due process issues — in other words, there was a desire not to have every single detail and piece of paper subject to public debate, but all procedural decisions, key documents, and decisions were made public. So, I think there has been a balancing act, and I can see movement towards greater transparency.

M2: I will add on commercial arbitration. It is actually interesting: in the United States, commercial arbitration is not confidential, it is private. So, you cannot get to the dockets, as **P1** said, other than for class arbitration, where actually the AAA does put docket information in some of the filings online. But it is secret, so you cannot attend the hearings like you could a court case. But, unlike some countries, where when you agree to arbitration, you imply the promise to keep everything about the process confidential — that is not U.S. law. So, if you want to protect confidentiality in an arbitration, you really need a separate contractual agreement to do so, otherwise, the parties are free individually [to release information, although] sometimes not awards. The institutional rules may address that, but otherwise, there is no confidentiality obligation on the parties to the arbitration proceeding unless there is a separate agreement. I mean, you see this come up all of the time in some of the domestic cases involving employment contracts and some of the #MeToo issues. Frankly, arbitration is not confidential, unless there is a separate confidentiality provision. Most of those contracts have separate confidentiality provisions, and that is really what a lot of the concerns are about. Yes.

A2: [audience question]

10. *Abaclat v. Argentina*, ICSID Case No. ARB/07/5, Procedural Order No. 3 (Confidentiality Order) (Jan. 27, 2010).

P3: Yes, that is a good question. So, early in the case, by the case management conference, the parties or the ICC court of international arbitration can decide to remove the case from the expedited track. If by that time, which is still very early on, if by that time it is apparent that the case is going to require more time, it presents complicated issues, and is just not going to be able to stick on this fast track. But in the case where the arbitration proceeds under the expedited provisions; the fee structure incentivizes, in a way, the arbitrator to stick to the given timeline. So, the ICC actually started using its fee structures with the 2012 rules to incentivize the timely and efficient administration of its cases. So, that is one way in which the case is to remain on track. In addition, the language has now been updated to reflect the party's obligations to also manage and proceed with the case in a time-efficient manner. If you look at the ICC arbitration rules, there are case management tips in there that are strongly encouraged, such as narrowing the issues in dispute, such as not producing witnesses or extraneous information that really is not necessary to resolving the dispute. So, there are tools at the disposal of parties and arbitrators to try and stick as much as possible to that timeframe.

Now, in reality, I think we have to see how this plays out. The new rules have only been in place for one year, so 2018 was the first year in which the expedited provisions applied. I have to be honest with you, I have not looked to see how that played out. But, certainly, that will be some area of interest to see, "Is this working as intended?" One of the unique features of ICC arbitration is the mechanism of internal review, so it is within six months that the arbitrator must provide a draft award to the ICC court for review. But then the ICC itself does an internal review of the award to make sure that it satisfies: one, that it resolves the issues that were in dispute; two, that it will be an unenforceable award under the New York Convention. Meaning, there are no excess or manifestly excess — that the arbitrator has not exceeded its authority, manifestly exceeded its authority, that the award does not contravene fundamental public policy considerations of the seat. So, really, the six months is the timeframe for the draft, and then the review process takes place, which should be fairly short, but that can also be a little bit long.

M2: P1, is ICSID doing anything about making sure or trying to speed the process up?

P1: Yes. So, it is a great question. ICSID has now in the new rules instituted deadlines for three types of decisions or awards. The first one is what we used to refer to as 41(5). It now has a new rule number because

they've shifted all of the numbers around.¹¹ It is 35(4) now. What it means is you can file an application early on in a dispute and say, "This is manifestly without legal merit." A tribunal has to decide that, now, within two months. For a preliminary question, a jurisdictional objection, has to happen within six months. For everything else, which is really the award, it has to happen within eight months. Then I ask, "Eight months [from] what?" I think it is eight months [from] the last submission from the parties on the issue. Does this have teeth? Not necessarily — it is a best effort standard. So, we do not have something like the arbitrators are not going to get paid or they get paid only after they issue the relevant award or decision.

But I would just also add in keeping with this broader trend for transparency, the field is developing very quickly, and there is an initiative called Arbitrator Intelligence, which you should know about. It is essentially an online collection of information from people who use arbitration about arbitrators. One of the questions that is asked of parties or their counsel after a case is, "Were you satisfied with the speed with which the tribunal acted and who were the tribunal members?" Arbitrators are aware of that as well, so their reputation is something that will separately motivate them to want to act quickly.

M2: I am on the board of directors at Arbitrator Intelligence. **P1** is going to get his check after the event. Arbitrator Intelligence is a non-profit, so there actually [are] no checks, there is no budget. It collects data on arbitrators after their performance, and then it'll provide [that data] to clients in reports and that would be how it sort of funds itself If you're interested, please do take a look [at Arbitrator Intelligence's web page]. The most important part of the process . . . is to get people to fill out the questionnaires because there is, frankly, a lot of freeriding that goes on. So, it is getting better, but we can always use more information. Let me just put it that way — we are now to the point of early stages of coming up with draft reports and that hopefully we will keep moving forward as well. So, thank you, **P1**.

P4: **M2**, can I jump on that one?

M2: Of course.

P4: I couldn't provoke you to a fight on the Restatement, [but] you [have provoked] me on Arbitrator Intelligence. Strong caveat: Arbitrator Intelligence relies on reports from parties. The AAA, with which I've been associated for a very long time, has for years tried to collect feedback from parties after the conclusion of a case on how the arbitrators, how the institution, did. They get lots of feedback from the losing party, largely

11. *See id.* at 119.

negative. It is very hard to get feedback from the prevailing party, which presumably is happy. I suspect the same psychology is going to create a real problem for Arbitrator Intelligence. It is going to collect a lot more complaints than it is going [to] collect pats on the back. I would advocate real caution in looking at anything from that source because I think the psychology is very difficult to overcome. The loser complains, the winner just takes the money and runs.

P4: I have one additional comment. Some of the aspirational elements for the field that we've been discussing — the efficiency, transparency, diversity of arbitrator appointments — these are things which at the level of looking at the field, or looking at it academically, there is broad consensus in favor of those elements. If you are managing a particular dispute, however, as an advocate, your task is to succeed for your client. So, sometimes that mitigates against these different elements. For example, it is easy to say, "All cases should go very quickly." Until you have a \$2 billion dispute that you're very concerned could come out the wrong way. It is very easy to say there should be diversity in arbitrator appointments, which I included in every memorandum when I am proposing candidates to people. If you are a board or a general counsel, whether it is a sovereign or a company, you have to make a judgment call about the appointment that makes the most sense for the particularities of your case, because your objective is to protect your company, state, et cetera, not to generally promote healthy policies for the field. The same could be said for transparency as well. I see the arbitrator issue, in part, as related to transparency. I was at one event about a year ago, and somebody said, "Isn't it true that it would be unfair if on one side [is] White & Case?" They mentioned White & Case, but I could mention some other firms of my colleagues. "White & Case has a lot of information about arbitrators. It is a huge practice with many deeply experienced partners. Wouldn't that give an unfair advantage to the White & Case client?" To which I said, "Exactly."

M2: To which Arbitrator Intelligence says, "Yes, exactly." So, **P4's** concern is absolutely a fair one, . . . people comment when they're unhappy, and that is going to be their focus. Clearly, it is something that we are aware of and are working to try to combat through various means of collecting data more systematically than just having random losing parties complain. I guess, the other thing to keep in mind is this is all in comparison to something. You cannot just say, "Yes, in the ideal world, we will have perfect information." There is information now, but as **P4's** comment illustrates very nicely, it is one-sided information. The whole idea of Arbitrator Intelligence is trying to provide another side even for the White & Case clients because there are a lot of other arbitrations out there, particularly for the people who do not have White & Case. We'd all [like to] have [a]

perfect world, but that is not the comparison. The comparison is, “What do we have now and what can we do better?” So, to your question.

P4: That is a good question. I do not see that issue as relating so much to efficacy, as I see it bringing ICSID in line with other practices because ICSID is really *sui generis* in the fact that it goes to the other two arbitrators, which creates this tension among the tribunal members. But to answer your question as it relates to efficiency and challenges, the new rules do tackle that because they say that challenges must now be brought — the old rules said “promptly”, whatever that means. The new rules say it has to be within twenty days of either the appointment or the knowledge that you got that led to the challenge. That is bringing the challenge, and then the decision on the challenge has to happen within thirty days, so, concrete deadlines are given. I think the debate in the community is probably more, “What’s a meritless challenge?” or, “What to do when parties bring repeated challenges?” Because you still have to continue to follow this procedure. Every time, you’ve got twenty days and then you have thirty days, this can happen. What happens with challenges late in the proceeding, which can be more disruptive?

Let me add a caveat on that. The ICSID rule, which is novel on this, says, “For challenges, if the challenge is successful, then when a new arbitrator is appointed to the tribunal, the parties have the option of asking the tribunal to revisit every decision that the old tribunal came up.” Consider what that means then for a successful challenge that happens late in the proceeding.

P4: Can I just weigh in on the subject of challenges? If you’re interested in challenges, the LCIA, the London Court of International Arbitration, has, as far as I know, a unique policy that it publishes decisions on challenges. If an arbitrator is challenged at the LCIA, the LCIA court, which is the body that passes on arbitration questions, will appoint an officer or a panel of three to decide the challenge. Whoever gets that appointment has to write an opinion explaining why the challenge was rejected or accepted. With the names laundered, the LCIA has begun publishing those. It is developing a body that you can look at to get explanations for why a challenge is accepted or rejected.

M2: Other questions? Yes. Back in the corner.

A3: [audience question]

P2: Thank you for your question. First of all, I think that it is going to be hard to put the genie back in the bottle because this has been a historic break from U.S. policy over the past twenty-five years. Now, there is a benign [way] to look at it, which is that it is normal over time to adapt, evolve, constrain different dispute resolution mechanisms, be it at the treaty level or be it at the level of rules. So, that much is unsurprising. But here, clearly, what has motivated this change is something more fundamental, called

sovereignty. Our perspectives that this Administration and this U.S. Trade Representative have with respect to sovereignty and submitting the acts of a sovereignty to an international decisionmaker. So, there has been a historic move away from the approach that the United States has endorsed, which has been internationalist, globalization-oriented. There is a fundamental shift, and obviously the next election could determine where this goes next.

I would only add one other thing, which is that we are now in an unusual environment where effectively the right wing of the Republican party and the left wing of the Democratic party seem to be aligned in their opposition to key elements of free trade agreements. So, I will put in quotation marks, the “populist wings” of the two parties are aligned against this. Whereas, for the past twenty-five years, basically since the Cold War, there has been a centrist, bipartisan consensus at the executive branch level; whatever people say during elections. At implementation time it is been somewhat of a consistent bipartisan approach. So, we do not know. The same as we do not know, “Where is Brexit going to lead us? Where is NAFTA going to lead us?” We could be in a very ugly debate right now with the Democratic House, obviously, with great tension with the White House. Is there a risk of a hard exit from NAFTA? What would that mean? I think that the jury is out, and I think that we need to step very carefully because Humpty Dumpty is breaking in front of eyes, and that could have a lot of repercussions if we are not careful.

M2: To echo what **P2** said, a little less diplomatically, whenever you find Donald Trump and Elizabeth Warren in agreement, you should be very concerned.

M2: So, on that cheery note, I think we are right on track to finish at 11:45 AM on schedule. So, thank you again to the *BLR*. Now that I know the proper abbreviation to refer to you all as. Thank you to you all in the audience for being here. Thank you to the panelists, and it is a great event. I am very glad to be here for it. Thank you.